Supreme Court, U.S.
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02 350 SEP - 3 2002
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No.

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR,

Petitioners,

v.

ADIRONDACK PARK AGENCY OF THE STATE OF NEW YORK,

THE LAKE GEORGE PARK COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX - VOLUME III

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APPLICABLE LAWS, RULES AND REGULATIONS; LEGISLATIVE HISTORY; PLAINTIFFS' COMPLIANCE AND PERMITS RECEIVED

112. Upon information and belief, during the 1960 session of the New York State Legislature, certain legislation was proposed for the purpose of creating a Park Commission for Lake George.

113. Upon information and belief, the legislation proposed in the 1960 Legislative session did not pass.

114. Upon information and belief, legislation creating a Commission for the Lake George area again was introduced in the 1961 session of the New York State Legislature.

115. Upon information and belief, said legislation passed and became Chapter 454 of the Laws of 1961.

116. Upon information and belief, the stated legislative intent of said Chapter was to preserve and to develop recreational facilities for "the people".

117. Upon information and belief, said legislation also established "zones".

118. Upon information and belief, said zones were to be included within the physical boundaries of an area which was undefined in said legislation.

119. Upon information and belief, nowhere in said Chapter or previously was a "park" defined.

120. Upon information and belief, in creating the Lake George Park Commission, the powers of such entity related to the designation of the proposed non-commercial "zones".

121. Upon information and belief, contained in the

Bill Jacket for Chapter 454 of the Laws of 1961, L. Judson Morhouse, hereinafter referred to as "Morhouse", in his then capacity as Chairman of the New York State Republican Committee, wrote by Memorandum dated January 25, 1961 to Robert MacCrate stating Morhouse's belief that the method of "zoning", as set forth in Chapter 454 of the Laws of 1961, was "one of the only ways" to achieve the desired regulation of the Lake George area.

122. Upon information and belief, also included in said Bill Jacket was a copy of a letter from Morhouse to Assemblyman R. Wayne Pomeroy referring to said bill as "my baby".

123. Upon information and belief, an typewritten paragraph titled MORHOUSE PLAN and captioned as an excerpt from Adirondack Sportsman by Bill Roden also is contained in the Bill Jacket.

124. Upon information and belief, yet another letter from Morhouse, this dated March 9, 1961, and addressed to then Governor Nelson A. Rockefeller, supported the "final version" of said bill.

125. Upon information and belief, also contained in said Bill Jacket was a newspaper clipping noted as purportedly having been taken from the Sunday, March 28, 1961 Albany Times-Union, which pointed out that Morhouse, described as the "moving force behind" what became Chapter 454 of the Laws of 1961, owned a home located on Lake George on the shore outside Ticonderoga.

126. Upon information and belief, at some time thereafter Morhouse became the Chairman of the Commission as established by Chapter 454 of the Laws of 1961. 127. Upon information and belief, a clear statement of opposition to Chapter 454 of the Laws of 1961 was set forth in a formal Resolution of the Town of Queensbury, formally adopted by the Town Board of that Town.

128. Upon information and belief, said Town was and is directly impacted by such legislation.

129. Upon information and belief, the Town of Queensbury specifically objected top the approval of what became Chapter 454 of the Laws of 1961 in part on the grounds that ". . . the powers and duties of the Commission as set forth in the bill infringe upon the power of the Town t o [sic.] regulate the use of property in the Town of Queensbury in the area described in the bill."

130. Upon information and belief, based upon the content of said Resolution of the Town of Queensbury was sent by said Town to Assemblyman Richard Bartlett and Senator Eustice Pain, the two (2) elected representative whose areas of representation included the Town of Queensbury.

131. Upon information and belief, the State Council of Parks, a part of the Division of Parks within the Conservation Department, by letter dated April 7, 1961, and included in the above mentioned Bill Jacket, also opposed the approval of what became Chapter 454 of the Laws of 1961.

132. Upon information and belief, the zones and zone concept set forth in Chapter 454 of the Laws of 1961 was altered on two (2) occasions by legislative enactments following the original 1961 Chapter Law.

133. Upon information and belief, Defendant DEC derived legislative authority with respect to Lake George by regulation 6 NYCRR Part 646 dated July 3, 1981.

134. Upon information and belief, pursuant to and by the exercise of such apparent authority legislatively granted and delegated to Defendant DEC as a sub-unit of the Executive branch of New York State government, by ECL 3-0301.2, ECL 9-0105.3 and 43-0107.5 (since recodified

as 43-0107.19) DEC required that owners of marina facilities situated on Lake George were required to complete an application for a non-revocable Permit to Operate a Marina "on Lake George".

135. Upon information and belief, as part of the implementation of said requirement Defendant DEC issued a form bearing issuance date in lower left hand corner of "8/81" for that purpose.

136. Upon information and belief, pursuant to the requirements established by DEC each such applicant for the above mentioned Marina permit was to select and specify from a DEC predetermined limited menu of "marina" activities being provided by the entity making application.

137. Upon information and belief, each such responding applicant was required to respond in a timely manner to the DEC to specific questions with respect thereto.

138. Plaintiffs responded to and complied with all the requirements of 6 NYCRR 646 (July 3, 1981).

139. By letter signed by Defendant White then Secretary to Defendant LGpC, dated December 15, 1981, DEC, acknowledged receipt of Plaintiffs' application to operate a marina on Lake George.

140. By notice issued December 16, 1981, the DEC by its agent, White, distributed notification of Plaintiffs' application to other persons and entities, identifying the Salvadors' "Dunham's Bay Lodge" as an "Existing Marina".

141. The above mentioned Notification included notification to Defendant Town of the DEC's intent to issue a Permit to Operate a Marina to Plaintiffs "on Lake George" in the DEC Lake George Recreation Zone (6 NYCRR Part 190.27), as a pre-existing non-conforming use within a

Residential Zone of Defendant Town and within a Vessel Regulation Zone of Defendant Town.

142. Thereafter by Permit Number 50-81-0071 MA, dated March 22, 1982, and duly executed by Permit Administrator Richard A. Wild, the DEC issued to Plaintiffs a non-revocable Marina Permit pursuant to Article 9, Title 1 of the Environmental Conservation Law and the provisions of 6 NYCRR Part 646.

143. Said Marina Permit Application specifically affirmed that the services provided included the sale or rental of watercraft, the sale or rental of marine products, the rental, lease or accommodation for boats and other, etc., 75 parking spaces for vehicles, provision of trash receptacles and rest room facilities, as well as establishing 67 boat slips and one mooring as the vessel berthing capacity, all being maintained and operated at Plaintiffs' facility. (Other activities include boat storage, fuel dispensing, etc.)

144. The resulting non-revocable Marina Permit, incorporating the provisions of the application, recited only in part inclusion, among other things of "Sale or rental of marine products, services and dock space for 67 boats."

145. At this time, the term watercraft as used within the existing 6 NYCRR Part 646 regulation language was encompassed in the defined term "vessel", stating specifically"

> Vessel: means every description of water craft, other than a seaplane, used or capable of being used as a means of transportation on water.

146. The above mentioned definition did not differentiate in any way among the various types of available watercraft, including but not limited to motorized boats, canoes, jetskiis, PWCs of any type or kind, or

sailboats.

147. Plaintiffs, in compliance with their application and with the terms and conditions of the duly issued non-revocable Marina Permit, continuously conducted business at the site specified therein from that time forward to and including the date hereof.

148. Plaintiffs conducted said business in reliance upon the validity of said non-revocable permit and the authority of the DEC to issue such non-revocable Marina Permit as an extension of the legislative grant of authority to the DEC.

149. The regulations set forth in 6 NYCRR Part 646 dated July 3, 1981, established the Lake George Park Recreational Zone Regulations operating on the Lake George Recreation Zone. (6 NYCRR Part 190.27)

150. Defendant DEC's regulations thereby required two (2) separate and different applications, one (1) for the registration of legally pre-existing wharfs and one (1) for the continued operation of a marina.

151. Plaintiffs duly complied with both of the above requirements.

152. The requirement with respect to wharfs, established by Defendant DEC, pursuant to 6 NYCRR Part 646, also required registration of "wharfs legally in existence on Lake George prior to the effective date of the Lake George Recreational Zone Regulation".

153. The provisions of 6 NYCRR Part 646 (July 3, 1981) were promulgated as the Lake George Park Recreation Zone Regulations.

154. The Lake George Recreation Zone did not and does not include private lands.

155. The definition of the "Lake George park" did

and does include within its scope private lands.

156. There exists a clear differentiation between the area and property encompassed by the Lake George Recreation Zone and the Lake George park as set forth and specified by statute.

157. Plaintiffs also duly and timely complied with the requirements of the Lake George Recreational Zone Regulations and by registration form dated November 14, 1981, duly registered their existing wharfs.

158. Defendant DEC acknowledged Plaintiffs' above mentioned wharf registration and issued a confirming letter on April 1, 1982.

159. The Certificate of Registration of said wharfs duly executed by Richard A. Wild was not issued to Plaintiffs until October 14, 1982.

160. In a letter of Charles Hawley letter dated April 1, 1982, at the time at which Hawley as the Chairman of Defendant LGpC, advised that new construction would require a permit from Defendant DEC.

161. Plaintiffs completed all previously DEC authorized wharf construction in its entirety prior to April 1, 1982, the date of the above mentioned Hawley letter.

162. Defendant LGpC was created as an "Independent Agency within the Department", referring to the DEC, pursuant to Chapter 454 of the Laws of 1961.

163. Since the original LGpC entity lacked legislatively granted authority to act, starting in 1962, with the enactment of Chapter 794 of the Laws of 1962, and continuing forward to the present date, Defendant LGpC obtained expansion of the legislative grant of authority given to it.

164. With the reorganization of Defendant DEC in

1972 and the recodification of Article 43 of the Environmental Conservation Law, hereinafter referred to as the "ECL", to include ECL section 43-0117, entitled the "Lake George park Commission", the powers of Defendant LGpC again were expanded.

165. In 1987, with the enactment of Chapter 617 of the Laws of 1987, amending only the Environmental Conservation Law, the Navigation Law, the Vehicle and Traffic Law, and purportedly amending the State Finance Law, the Lake George Park Commission Trust Fund was attempted to be created.

166. Chapter 617 of the Laws of 1987 effectively and substantially impacted numerous areas of regulatory authority not previously related to the scope of legislatively delegated authority of Defendant LGpC.

167. Chapter 617 of the Laws of 1987 expanded the authority of Defendant LGpC to grant to Defendant LGpC powers of zoning regulation and taxation and purportedly established Defendant Trust Fund.

168. Chapter 617 of the Laws of 1987 gave an expansive grant of power and authority to Defendant LGpC.

169. Under the provision of that Chapter, Defendant LGpC even obtained police powers under the auspices of the Vehicle and Traffic law and the Criminal Procedure Law .

170. Chapter 617 of the Law of 1987 with the grant of police powers to Defendant LGpC authorized the arming of Defendant LGpC's employees and agents as Peace Officers.

171. Between Plaintiffs' 1981 application for a Marina Permit with the subsequent issuance of a Marina Permit to Plaintiffs by Defendant DEC, Plaintiffs duly complied with all applicable laws, rules and regulations with respect to their commercial operation on their private

lands and to the extent their operation was on public land, and continue to do so to the date hereof.

172. During the period following the initial grant of authority to Defendant LGpC in the 1987 legislative enactment, Defendant LGpC filed regulations under Subpart 646-2 of Chapter IX, Independent Agencies Within the Department section of the NYCRR relating to Defendant DEC.

173. Said regulations were created with respect to registration of "recreational uses".

174. Those Regulations as noticed and published, as required by statute (Section 5 of Chapter 617 of the Laws of 1987 amended ECL 43-0117), set forth provision for "registration" of all (private and commercial) recreational uses with Defendant LGpC.

175. ECL 43-0117 in its entirety refers to activities on Lake George; i.e., upon the waters of Lake George.

176. The provisions of Subpart 646-2.2 (b) clearly set forth the intent to "grandfather" prior existing commercial and private uses and to provide for a period of two (2) years in which Defendant LGpC could "create" the necessary registration form(s), provide them to pre-existing users, both commercial and private, and allow for their filing on or before June 3, 1988.

177. The "grandfathering" provisions clearly relate to prior existing uses.

178. Absent the "grandfathering" of such prior existing uses the provisions would be subject to challenge and invalidity resulting from implementation of ex-post facto regulation.

179. Subpart 646-2.2 governing the above referred to Registration enumerates a listing of activities included in the items for registration.

180. The history of Subpart 646-2 is significant including the fact that after its original filing May 13, 1988, it was thereafter renumbered to 646-1.6, with Rule Making Activities Publication in the March 6, 1991, State Register, for the stated purpose of amending Subparts 646-1 and 646-2 and repeal of section 646-2.2 and amendment of Subparts 645-3, 645-5 and 645-7 of Title 6 of the NYCRR.

181. The above referenced publication contained reference to the adoption of "Stop gap rules governing certain 'recreational activities' . . . ." by the LGpC on June 3, 1988, the above referenced provisions of Subpart 646-2.

182. The statement in the State Register continued in pertinent part to state that the purported "interim provisions" of Subpart 646-2 were intended ". . . as a means to provide controls over new commercial enterprises involving the specified recreational activities . . . ."

183. This provision only related to commercial and did not in any way deal with non-commercial activities.

184. Continuing, the Notice contained in the State Register went on to state:

> Section 646-2.2 contains definitions of the recreational activities which will be subject to one or more limitations: new recreational activities, parasailing, personal watercraft (trade names jetskiis, wave runners, etc.), scuba diving, seaplanes, tour boats and towing.

185. The State Register went on to elaborate, by way of explanation, as follows:

> Section 646-2.4 establishes permit requirements for any new recreational activity such as a new type of craft not

> previously operated on the waters of Lake George. Under these provisions a new use, such as private submarines, would be subject to review by Defendant LGpC prior to being allowed to operate on Lake George, prior to issuing the permit . . . .

186. The recitations contained in the State Register did not regulate any non-commercial use.

187. Again, continuing, the Notice set forth in the State Register went on to specify:

> Existing operations, that is, tour boats, seaplanes and parasails operated on the lake prior to the effective date of the rules would be granted a permit after an application had been duly filed.

188. When the regulations referred to in the State Register publication ultimately were filed and effective, by their terms, those regulations specified the definition of New Recreational Activity as follows:

> (1) New recreational activity or use means a recreational activity not introduced on the waters of Lake George as of January 1, 1991. [Emphasis Added]

189. By regulation effective August 14, 1991, and contained in Subpart 646-2.4, Special Navigational Rules, Permits, the permitting process with respect to those activities enumerated in Subpart 646-2.3 specifically was limited to ". . . any new recreational activity or use . . . ."

190. Plaintiffs' compliance with Defendant LGpC's original Registration of Recreational Uses, clearly met and by the responses submitted therewith, exceeded in detail the responses required for such registration by Defendant

LGpC.

191. Plaintiffs' filing was both timely under the original provisions of the 1988 regulations of Defendant LGpC and certainly a record of prior existing recreational uses claimed by Plaintiffs as of the January 1, 1991, date establishing a new, extended date for the base-line determination of recreational uses.

192. Nowhere in the regulations as adopted, or in the Notice contained in the State Register was there any language of limitation relating to continuous usage or usage before 1988, between 1988 and 1991, or other specification of such dates of limitation.

193. Plaintiffs first "registered" their recreation uses with the DEC on November 21, 1981.

194. Plaintiffs both met and exceeded the Recreational Uses Registration requirement pursuant to the written request of Defendant White made on behalf of Defendant LGpC, in some cases to the point of redundancy since Plaintiffs already had registered the "Sale or Rental of Watercraft" with Defendant DEC.

195. Plaintiffs relied upon the representations of Registration in the belief that the uses as registered had been accepted by Defendant LGpC Commission and were, therefore, "grandfathered" for any future permitting purposes of Defendant LGpC.

196. Defendant LGpC in no way contested Plaintiff's filing with respect to the Registration of Recreational Uses.

197. Defendant LGpC allowed Plaintiffs' Registration of Recreational Uses to stand unchallenged from April 1990 until the notification of the requirement for application to Defendant LGpC for a Class A Marina Permit was sent by Defendant LGpC to Plaintiffs.

198. While Plaintiffs attempted to comply with the

request of Defendant LGpC for application, Plaintiffs' position remained that their existing filings and application to Defendant DEC for Recreational Uses remained as a valid registration of activities thereby grandfathered.

199. Plaintiffs' interests were established by their registration and acceptance by Defendant DEC and could not later be abridged by unilateral action of the very entity which accepted that filing, Defendant LGpC.

200. If nothing else, Plaintiffs were entitled to rely upon Defendant LGpC's acceptance of these filings when over fifteen (15) and seven (7) years respectively passed before any action was initiated by Defendant LGpC which in any way or manner could be viewed as even a questioning of the grandfathering efficacy of that filing.

201. The basis doctrine of laches prohibits such bureaucratic laxity without even considering the Constitutional ramifications of such attempted action.

202. Plaintiffs were operating and continue to operate under and by virtue of an affirmed application and a validly issued and continuing permit from Defendant DEC, specifically Permit Number 50-81-0071 MA, dated March 22, 1982.

203. Pursuant to law, no legislation has been adopted to supplant the authority of Defendant DEC to issue such operating permit, and said permit still validly authorizes Plaintiffs' operation.

204. On or about March 6, 1990, Defendant White corresponded with Plaintiffs, sending to Plaintiffs the "Lake George Park Commission Application for a Class A Marina Permit". 1. A "Simplified Form" was received by Plaintiffs from Defendant LGpC, furnished by Defendant LGpC agent Keith Fish to be used for recreational uses.

205. After receiving Fish correspondence, Plaintiff

John Salvador responded by letter dated April 23, 1990.

206. Included therewith, Plaintiffs forwarded the duly completed application for registration of recreational uses to Defendant LGpC.

207. Enumerated in Plaintiff's response and registration is the specific request of Plaintiffs for the recording of all recreational uses which as of the date thereof, or in the past, prior to the statutory date of January 1, 1988, were conducted at Dunham's Bay Lodge.

208. Based upon applicable laws, rules and regulations, there existed no requirement that such uses were to be either continuous or occasional.

209. As specified in the Application for registration, Plaintiffs submitted a detailed listing of the recreational activities which Plaintiffs were registering with Defendant LGpC pursuant to Defendant White's request.

210. The original request, as well as the content of Subpart 646-2.2 did not limit such registration of pre-existing uses to facilities owned, offered or controlled by the Marina owner or operator.

211. Subpart 646-2.2 (c) specifically stated that the activities in question were those which were "owned, operated and engaged in on the waters of Lake George".

212. Subpart 646-2.1 also filed May 13, 1988, the stated Intent of the regulations was to "regulate commercial and private recreational activities on the waters of Lake George . . . ."

213. With the stated intent of the provisions in question being regulation of the use of property, those recreational activities which were pre-existing and some beyond the scope of Defendant LGpC regulation, clearly were and are entitled to be afforded the protection of "grandfathering" of "pre-existing" registered activities.

214. The mandated registration of pre-existing uses for the purpose of establishing a base-line for future determinations of what activities did and did not qualify for the "grandfathering" protection is rational and an apparent reasonable quasi-legislative requirement for a person or entity to afford itself of this protection.

215. Plaintiffs acted in reliance, not only on the letter of Defendant White and the forwarding of a new registration form developed by Keith Fish, but also upon the promulgated provisions of Subpart 646-2 concerning recreational uses and registration.

216. Plaintiffs complied with the specific request of Defendant White and the requirements of Subpart 646-2.

217. When Plaintiffs met the above mentioned requirement, Plaintiffs became entitled to the benefits of "grandfathering" clearly afforded to them by the regulations as promulgated.

218. Upon meeting said requirements, Plaintiffs also became entitled to the benefits of "grandfathering" as part of the provisions of the recreation uses permitted by the DEC in 1982, "sales or rental of watercraft".

219. At the time of the filing of Plaintiffs' response to Defendant White's request, the duly completed Recreational Use Registration was filed and was in the hands of Defendant LGpC prior to the June 3, 1990, date specified in Subpart 646-2 (b) wherein the two (2) year "grace" period was established for registration of existing uses.

220. The cover letter of Defendant White and the form provided to Plaintiffs was both vague and unclear concerning what was to be included and how the information was to be submitted in response to the request.

221. Defendant LGpC re-issued a new and separate Application for Registration of a Recreational Use.

222. The vagaries of the form provided by Defendant LGpC to existing users, to a significant extent, followed the vagaries of Subpart 646-2 itself.

223. When Plaintiffs responded and timely filed their Registration with Defendant LGpC pursuant to Defendant White's request, Plaintiffs did not respond with vagaries.

224. Plaintiffs in their filing with Defendant LGpC provided detailed specifics concerning the recreational uses which Plaintiffs affirmed as pre-existing uses for the purpose of the Subpart 646-2.2 registration.

225. Plaintiffs relied upon the clear implication of and implicit representation of intent to "grandfather" such activities for the purpose of future regulation by Defendant LGpC.

226. Following Plaintiffs' completion of and filing of the above referenced Registration of Recreational Uses with Defendant LGpC, Plaintiffs heard nothing further from Defendant LGpC concerning such uses until June 24, 1996, when Plaintiffs first were informed of the requirement by Defendant LGpC for Plaintiffs to "apply" to Defendant LGpC for a Class A Marina Permit.

LGpC APPLICATION AND LGpC'S POSITION ON NAME OF APPLICANT

227. Plaintiffs are the holders of a certain Marina Permit duly issued by the New York State Department of Environmental Conservation on March 22, 1982, Marina Permit No. 50-81-0071MA authorizing the operation of a Marina at the designated location of Plaintiffs' property in the Town of Queensbury situated in the area more

commonly known as Dunham's Bay.

228. On or about June 24, 1996, Plaintiffs received written notification from Defendant LGpC that Plaintiffs were to be required to apply for a Permit to Operate a Class A Marina.

229. Upon information and belief, Defendant LGpC established two (2) classes of Marine Permits which it issued, specifically Class A Marina Permits and Class B Marina Permits.

230. Upon information and belief, Class A Marina Permits were to be applicable to entities defined in Chapter IX of Title 6, New York State Codes, Rules and Regulations, hereinafter referred to as the "NYCRR", Environmental Conservation, Independent Agencies Within Department, section 646-1.2.

231. Upon information and belief, Class B Marina Permits were applicable to entities defined in Chapter IX of Title 6 of the NYCRR, Environmental Conservation, Independent Agencies Within Department, Section 646-1.3.

232. On or about May 13, 1997, by correspondence directed to Defendant DeSantis, as Chairman of Defendant LGpC, relating to the application of Plaintiffs with respect to Defendant LGpC's Update/Renewal process, certain documents were forwarded to Defendant LGpC.

233. The above specified submission was made on behalf of Plaintiffs in accordance with the instructions of Defendant LGpC personnel in form content and timing, in support of Plaintiff's Update.

234. The documents submitted therewith were: Cover letter of submission from Plaintiff John Salvador, Jr., as President/Manager of Dunham's Resort Corp. d/b/a Dunham's Bay Boat & Beach Club; DEC Marina Permit Update Request, duly executed by Plaintiff John Salvador,

Jr., as President/Manager; and "Draft" Permit for the Operation of a Class A Marina as amended and corrected by Permittee with applicable Exhibits and attachments, including written explanation and summary of corrections and amendments to Defendant LGpC staff's original proposed "Draft".

235. By that correspondence request was made that the matter be set down for scheduling on the Commission's agenda and that Plaintiffs be notified promptly of such scheduling.

236. By that correspondence on behalf of Plaintiffs, the request also was made that if any additional information was required or if Defendant LGpC or its staff had any questions concerning the matter, response would be made by or on behalf of Plaintiffs.

237. The position of Defendant LGpC, best expressed by their Attorney, Martin Auffredou at the April 29, 1998, public meeting of Defendant LGpC, strongly recommended to Defendant LGpC that Plaintiffs, as "landowners" be named personally as the applicants and potential Class A Marina Permit holders, a requirement not imposed on other applicants or permittees by Defendant LGpC stating in pertinent part at that meeting that if ". . . there are problems down the road where Defendant LGpC has to get involved with somebody for an enforcement matter or litigated matter, my advice to you is to have the landowner for the purposes of legality, the landowner name has to be included."

238. Even one of Defendant LGpC members was wise enough to recognize the discriminatory treatment being afforded Plaintiffs and their application by Defendant LGpC and stated, "Martin, we just issued one to the Flamingo Restaurant [sic. Resort] on Lake George, and we didn't require George Pestinak's name. Is there any, what's

the difference between . . ."

239. At the conclusion of Plaintiffs' presentation at said April 29, 1998, meeting Plaintiffs attempted to withdraw the pending application for a Class A Marina Permit from consideration by Defendant LGpC.

240. In response to Plaintiffs' attempted withdrawal, Defendant LGpC raised the issue of pursuant to what authority Plaintiffs could continue operation, in response to which Salvador pointed out that the operation was and is governed by the existing DEC permit issued to Plaintiffs, specifically DEC Permit to Operate a Marina on Lake George No. 50-81-0071MA.

241. Defendant LGpC went so far, at that meeting, as to question Plaintiffs' (as applicants) right to withdraw such application, to which Mr. Auffredou first responded vaguely, in response to a further question stated, "I don't want to see John withdraw the application. . .", thereby clearly acknowledging the right of the applicant to withdraw such application.

242. As recently as the notification sent to Plaintiffs advising them of the scheduling their matter for the September 29, 1998, meeting of Defendant LGpC, Defendant LGpC reversed legal course and have stated unilaterally that Plaintiffs may not withdraw their pending application, even after the statement of clearly discriminatory intent with respect to the treatment of their application.

243. Following the conclusion of the April 29, 1998, meeting of the LGpC, Plaintiffs despite their formal withdrawal of their pending application, in an effort at conciliation, agreed to continue in "negotiations" with Defendant LGpC for the purpose of attempting to resolve outstanding differences.

244. To that end, Plaintiffs continued to provide voluminous documents and responses to Defendant LGpC.

245. By letter dated August 13, 1998, on behalf of Plaintiffs to Defendant Auffredou, as Counsel to Defendant LGpC, response was made to correspondence from Defendant Auffredou concerning a proposed meeting on a number of issues relating to Plaintiffs' Marina Permit.

246. By said correspondence on behalf of Plaintiffs, Defendant Auffredou was informed that, as part of Plaintiffs' attempts to resolve outstanding issues relating to said permit, Plaintiffs had been attempting to set up a meeting with the appropriate officials of the Department of Environmental Conservation to discuss a number of issues which are holdovers from Plaintiffs' existing Permit issued by the Department of Environmental Conservation.

247. Defendant Auffredou was advised that the issues to be addressed by the Department of Environmental Conservation were identical to a number of the issues considered by Defendant LGpC.

248. Defendant Auffredou was advised that it was Plaintiffs' position that it would be of assistance to the resolution of Defendant LGpC's issues if the meeting with the Department of Environmental Conservation were held prior to Defendant LGpC taking action on the pending application.

249. Since the Department of Environmental Conservation had not, as of that date, scheduled the proposed meeting, a face to face discussion on a number of these issues as well as others was requested with Defendant Commission and its counsel.

250. Proposed dates for such a meeting were requested from Defendant Auffredou.

251. On behalf of Plaintiffs, by said correspondence, request also was made that final action on Plaintiffs' permit be delayed by Defendant LGpC until these outstanding issues have been resolved in order to avoid unnecessary

litigation.

252. Defendant Auffredou was advised in that correspondence that at the proposed meeting responds would be made to Defendants' your questions concerning personal watercraft.

253. A meeting date was scheduled for August 18, 1998, at the offices of Defendant LGpC in Lake George, New York.

254. Said meeting was attended by counsel for Plaintiffs, Defendants Auffredou, White and Gallagher.

255. At said August 18, 1998, meeting, Defendant White, specifically conceded the intent of Defendant LGpC to utilize the Registration of Recreational Uses (referred to above in statutory history) as a method whereby such prior existing uses would be "grandfathered" and not subject to Defendant LGpC future limitation or required to proceed for "variance" before Defendant LGpC.

256. Upon information and belief, Defendant White's backing and filling on the topic wherein he stated that Defendant LGpC later altered the playing field for those, including Plaintiffs, who had diligently complied with Defendant LGpC's own regulatory requirement, was, at best disingenuous and at worst an exercise in Clintonian verbal manipulation.

257. Upon information and belief, according to Defendant White, after requiring the filing of the Recreational Use Registration, above described, deviated from its original intended purpose as set forth in Subpart 646-2 as promulgated on May 13, 1988, effective June 3, 1988, and unilaterally elected to promulgate new, revised regulations governing such recreational uses.

258. By repeal of Subpart 646-2 and replacement of it with new Subpart 646-1.4 relating to "Special Permits for

Recreational Uses", Defendant LGpC attempted to accomplish by administrative fiat what it did not have the authority to do by valid legislative authorization; i.e., develop recreation uses regulations for both commercial and private users on Lake George.

259. Plaintiffs' compliance with Defendant LGpC's original Registration of Recreational Uses, clearly met and by the responses submitted therewith, exceeded in detail the responses required for such registration by Defendant LGpC.

260. Plaintiffs' filing was both timely under the original provisions of the 1988 regulations of Defendant LGpC and certainly a record of prior existing recreational uses claimed by Plaintiffs as of the January 1, 1991, date establishing a new, extended date for the base-line determination of recreational uses.

261. Nowhere in the regulations as adopted, or in the Notice contained in the State Register was there any language of limitation relating to continuous usage or usage before 1988, between 1988 and 1991, or other specification of such dates of limitation.

262. Plaintiffs first "registered" their recreation uses with the Department Environmental Conservation on November 21, 1981.

263. Plaintiffs both met and exceeded the Recreational Uses Registration requirement pursuant to the written request of Defendant White, in some cases to the point of redundancy since Plaintiffs already had registered the "Sale or Rental of Watercraft" with the Department of Environmental Conservation.

264. Plaintiffs relied upon the representations of Registration in the belief that the uses as registered had been accepted by Defendant LGpC and were "grandfathered" for any future permitting purposes of Defendant LGpC.

265. Defendant LGpC in no way contested the filing of Plaintiffs with respect to the Registration of Recreational Uses.

266. Defendant LGpC allowed Plaintiffs' Registration of Recreational Uses to stand unchallenged from April 1990 until the notification of requirement for application to Defendant LGpC for a Class A Marina Permit was sent by Defendant LGpC to Plaintiffs in June 1996.

267. While Plaintiffs, attempted to comply with the request of Defendant LGpC for application, Plaintiffs continued and continue affirmatively to assert that their existing filings, and application to the Department of Environmental Conservation of Recreational Uses continue, as a valid registration of activities thereby grandfathered, to protect Plaintiffs' interests and could not later be abridged by unilateral action of the very entity which accepted that filing, Defendant LGpC.

268. Following the completion of said meeting on August 18, 1998, Plaintiffs' timely submitted their responses to the LGpC.

269. By letter dated September 10, 1998, counsel for Plaintiffs corresponded with Defendant Auffredou as counsel to Defendant LGpC.

270. Said correspondence dealt with additional information discussed at the August 18, 1998, meeting, and enclosed additional material for consideration by Defendant LGpC.

271. By said correspondence, it was reiterated that by submitting this information, Plaintiffs were in no manner accepting that Defendant LGpC had any authority to refuse to allow Plaintiffs to withdraw their application at any time during the pendency of its consideration by Defendant LGpC or any subpart thereof.

272. It also was requested on behalf of Plaintiffs that if there were any preliminary response from Defendant LGpC staff or Defendant Auffredou prior to the Committee's meeting date, such response(s) be provided to counsel for Plaintiffs within a reasonable time before the meeting date.

273. In the response to the issues and questions discussed at the August 18, 1998, meeting, a summary of the meeting and attendees was set forth, and the subject matter of the meeting identified as the application referred to for the purposes of that response collectively as the "Salvador's Application", but reiterating the fact that said collective reference herein shall in no way or manner was to be deemed to or considered to constitute any acknowledgment or acquiescence to any mingling of entities, each of which shall remain as legally constituted individual and separate entity(ies).

274. Said response next addressed issues relating to the legal authority of Defendant LGpC with respect to specific matters relating directly to Plaintiffs' application.

275. Next followed a brief recitation of the background and statutory authority involved, which has been dealt with more specifically elsewhere in this Complaint.

276. Before specific issues may be considered, this issue must be addressed and resolved.

277. In part, said background information supplied to Defendants reiterated information-both already in the possession of Defendant LGpC and also previously submitted by Plaintiffs as apart of the process before Defendant LGpC, but necessary to restate to clarify the position of Plaintiffs.

278. In said response it was stated that when Plaintiffs, in reliance not only on the letter of Defendant White and the forwarding of a new registration form

developed by Keith Fish, but also upon the promulgated provisions of Subpart 646-2 concerning recreational uses and registration thereof, complied with the specific request of Defendant White and the requirements of Subpart 646-2, they became entitled to the benefits of "grandfathering" clearly afforded to them not only by the regulations as promulgated, but also as by the recreation uses permitted by the DEC in 1982 (sales or rental of watercraft) and ultimately as protected by the United States Constitution, including but not limited to their right to be protected against a regulatory diminution of use of their property, without just compensation (non-revocable DEC permit) and equal protection of the law.

279. Continuing, said statement explained that rather than compensating Plaintiffs, through imposition of additional fees and charges, Plaintiffs, in effect were compelled to pay for the "privilege" of having Plaintiffs' properly registered and protected rights eroded.

280. At the time of the filing of Plaintiffs' response to Defendant White's request, Plaintiffs duly completed Recreational Use Registration filed it with Defendant LGpC prior to the June 3, 1990, date specified in Subpart 646-2 (b) wherein the two (2) year "grace" period was established for registration of existing uses.

281. Upon information and belief, thereafter Defendant LGpC

re-issued a new and separate Application for Registration of a Recreational Use.

282. The vagaries of the form provided by Defendant LGpC to existing users, to a significant extent, followed the vagaries of Subpart 646-2 itself.

283. When Plaintiffs responded and timely filed their Registration with Defendant LGpC pursuant to the Defendant White request, Plaintiffs provided detailed

specifics concerning the recreational uses which Plaintiffs affirmed as pre-existing uses for the purpose of the Subpart 646-2.2 registration.

284. As set forth in the response to Defendant LGpC, Plaintiffs relied upon the clear implication of and implicit representation of intent to "grandfather" such activities for the purpose of future regulation by Defendant LGpC.

285. Following Plaintiffs' completion of and filing of the above the Registration of Recreational Uses with Defendant LGpC, no communication about these matters was received by Plaintiffs until June 24, 1996.

286. At that time, Plaintiffs first were informed of a purported "requirement" of Defendant LGpC for Plaintiffs to "apply" to Defendant LGpC for a Class A Marina Permit.

287. In said response, it was asserted on behalf of Plaintiffs that, if nothing else, Plaintiffs entitled to rely upon Defendant LGpC's acceptance of their filings, when over fifteen (15) and seven (7) years respectively passed before any action was initiated by Defendant LGpC which in any way or manner could be viewed as even a questioning of the grandfathering efficacy of such filings.

288. As stated in said response, Plaintiffs relied upon the basis doctrine of laches would prohibit such bureaucratic laxity without even considering the Constitutional ramifications of such attempted action.

289. Plaintiffs were operating and continue to operate under and by virtue of an affirmed application and a validly issued and continuing permit from the Department of Environmental Conservation, specifically Permit Number 50-81-0071 MA, dated March 22, 1982.

290. Under and by virtue of existing statute of the State of New York, no legislation has been adopted to supplant the authority of the Department of Environmental

Conservation to issue such operating permit, and said permit still validly authorizes Plaintiffs' operation.

291. Also included in said response to Defendants was an analysis of Defendant LGpC's challenge to the grandfathering of certain specific activities previously conducted, documented, permitted to and registered by Plaintiffs.

292. Specifically, the activities challenged by Defendant LGpC include Balloon/parasail, PWCs, and sales and service of boats.

293. Plaintiffs constantly attempted to traverse Defendant LGpC's regulatory maze and consistently complied with each and every, requirement, filing and registration mandated by the ever-changing laws, rules and regulations of Defendant LGpC and as interpreted by Defendant LGpC.

294. Plaintiffs consistently and continually relied upon the grandfathering of each and every activity so filed, registered, and documented as required by the Department of Environmental Conservation.

295. Plaintiffs also detailed in said response the fact that in their original Application for a Permit to Operate a Marina, the application grandfathering the marina operation at that location dating back over twenty-five (25) years prior to that Application.

296. Plaintiffs had applied to the Department of Environmental Conservation and Plaintiffs were granted a non-revocable Permit to Operate a Marina, specifying services provided including, in part: Sale or rental of Water Craft (undefined and unlimited by the application and regulatory definition); Sale or rental of Marine Products; Rental, Lease **or accommodation** for Boats not Registered to the Owner (also undefined and unspecified by application

form and/or regulation); Parking Spaces for 75 Customer Vehicles; Trash Receptacles; Rest Room Facilities; and 67 slips.

297. Plaintiffs in their application provided to the Department of Environmental Conservation, the proper issuing authority, all material requested.

298. Plaintiffs were granted the non-revocable permit in accordance and based upon the terms of said application.

299. In 1990, Plaintiffs duly complied with the regulatory requirements of registration of recreational uses specifying in detail the recreational uses engaged in prior to the regulatory enactment, at Plaintiffs' facility by the "owners" and Plaintiffs' guests while using the facilities offered by Plaintiffs.

300. Responding to the vaguely worded regulatory demand for registration, in their response, Plaintiffs specified, with respect to several particular activities, that while Plaintiffs did not themselves provide the equipment for their guests to engage in certain specified activities, either the guests themselves or other guests had provided, for fee or otherwise, then provided and in the future would provide such equipment or mechanisms for engaging in such activities.

301. Plaintiffs specified that said activities included, but were not limited activities involving Balloon/parasail, PWCs, and sales of boats.

302. Plaintiffs went into detail in their submission and, in said document, under sub-heading of said registration titled "(2) Offering of Parasailing Rides" "Balloon" one (1) "engaged in" and under the sub-heading "(The Operation of a Seaplane" "Balloon" "0" "Owned - "0" "Operated" **but "engaged in"** one (1) by the facility and

others by Guests.

303. Plaintiffs established that the parasail operation "engaged in" directly relates to the Balloon operation also engaged in, since not all parasail operations require motorized towing.

304. As explained in their submission in response to the questions of Defendant LGpC and its staff, the prevailing wind intensity and direction at the Dunham's Bay site allows parasailing at vessel speeds within those permitted within the Town of Queensbury Vessel Regulatory Zone.

305. Plaintiffs also addressed the issue of the use of PWCs in their response.

306. As early as November 1981, Plaintiffs registered said use: The "Sale or Rental of Watercraft including Jet Skis" and noted that in Defendant LGpC's own definitions set forth in the State Register Notice Defendant LGpC defines at reference to Section 646-2.3 "personal watercraft" as "jetskiis", equating the jetski term with the more generic "personal watercraft" above referred to) "(5) Rental of Jet Skis or other Recreational Devices" under the "Type" heading of "Jet Skis" the Salvadors responded that Jet Skis under the heading of "Guests" as used and operated by Guests at the Salvadors' facilities.

307. In their response to Defendant LGpC's request for information, Plaintiffs also addressed the issue of the sale of boats.

308. As detailed to Defendant LGpC, Plaintiffs, in their registration specified under item "(4) Rental **OR OFFERING OF VESSELS**" responded their engagement in said activities with respect to all enumerated types, including but not limited to "Power Boats, Sailboats, Tour Boats, Sail Fish, Sun fish, Row Boats, Canoes & Kayaks".

309. Explaining in their submission to Defendant LGpC, in the original non-revocable Marina Permit issued to Plaintiffs by the Department of Environmental Conservation upon the original application of Plaintiffs, Plaintiffs were authorized by the Department of Environmental Conservation without objection from the Town of Queensbury to engage in the Sale or Rental of Water Craft and Marine Products.

310. As recited to Defendant LGpC by Plaintiffs in their response, Defendant LGpC by statutory mandate Chapter 617 of the Laws of 1987 (ECL 43-0117(5)) took legal status which it might enjoy from its regulatory predecessor the Department of Environmental Conservation to administer 6 NYCRR Part 646 (July 3, 1981).

311. Defendant LGpC, therefore, could not constitutionally deprive those landowners within the regulatory area assigned to Defendant LGpC of the landowners' Constitutional rights and property interests.

312. As a governmental entity, Defendant LGpC was and is not allowed to take private property without just compensation, and the limitation of an existing property constitutes such taking.

313. Plaintiffs detailed in the above mentioned response that by issuing the original non-revocable Marina Permit to Plaintiffs, after noticing the Town of Queensbury of its intent, the Department of Environmental Conservation acknowledged the existing "grandfathered" rights of Plaintiffs to certain specified and outlined operations.

314. After accepting said filing, and issuing the original non-revocable Marina Permit, the Department of Environmental Conservation placed Plaintiffs irrevocably into a class of specifically protected persons and entities entitled to the protection of their pre-existing uses and rights.

315. As explained by Plaintiffs with the enunciation of the mandate for the registration of recreational uses, and the subsequent filing and compliance therewith by Plaintiffs, Defendant LGpC, placed Plaintiffs into a further protected class with respect to the "grandfathering" of those uses.

316. Plaintiffs clearly established in their submission to Defendant LGpC that Defendant LGpC could not later be heard to complain that it "didn't mean it" or that it "changed its mind" or that it "decided to do something else" and thereby years later attempt to deprive Plaintiffs of these clearly established uses.

317. Plaintiffs explained to Defendant LGpC, that Plaintiffs, in yet another attempt to provide Defendant LGpC with information which has not been required of other applicants to establish "pre-existing uses" often which were not even registered by those applicants, provided Defendant LGpC voluminous testimony, photographs and documentation of Plaintiffs' basis establishing Plaintiffs' their entitlement to such uses.

318. In the notification sent to Plaintiffs advising them of the scheduling their matter for the September 29, 1998, meeting of Defendant LGpC, Defendant LGpC reversed legal course and stated unilaterally that Plaintiffs **MAY NOT WITHDRAW** their pending application, even after the statement of clearly discriminatory intent with respect to the treatment of Plaintiffs application.

319. Plaintiffs, however continued to cooperate with Defendant LGpC and its staff and submitted further additional and not legally mandated or required documentation establishing Plaintiffs' engaging in the activities challenged by Defendant LGpC.

320. Plaintiffs included in their submission to Defendant LGpC, a specific reservation of rights and

specifically affirmatively stated therein that by the submission of said statement and documentation, Plaintiffs in no way conceded the legitimacy of the demand of Defendant LGpC staff and advisors.

321. Plaintiffs also noted that the extent and nature of the "proof" required of Plaintiffs far exceeded the requirements placed upon other applicants before Defendant LGpC for the same or similar Permits, as is set forth in the minutes and records of Defendant LGpC itself.

322. By way of example of the failure of Defendant LGpC even to check, verify or accept the records kept in the ordinary course of business of agencies of the State of New York.

323. As part of their submission to Defendant LGpC, Plaintiffs, in support of their business activities as boat dealers, submitted documentary evidence that Plaintiffs were and are duly licensed by the New York State Department of Motor Vehicles as a registered "Boat Dealer" pursuant to the provisions of the New York State Vehicle and Traffic Law, with the current facility identification number of 7081805.

324. As set forth in Plaintiffs' prior filings with the Department of Environmental Conservation and with Defendant LGpC, Plaintiffs' facility has been and continues to include the operation of a Boat Dealer, with all of the legally associated functions affiliated therewith.

325. Earlier in the proceedings before Defendant LGpC, Defendant White challenged the legitimacy of Plaintiffs' operation to conduct repairs and to have the required State permits for a repair shop.

326. Defendant White failed to prepare properly and fully on behalf of Defendant.

327. If a full and complete search of applicable

records been made on behalf of Defendant LGpC, and had Defendant White made himself acquainted with the applicable laws relating to such "repair shops", Defendant White would have been aware of the fact that no separate "permit" is required for the referred to "repair shop" activities on the part of a State permitted Boat Dealer such as Plaintiffs.

328. Before Plaintiffs could seek a State Permit as a Boat Dealer, Plaintiffs were required to have, as Plaintiffs did have as a pre-existing non-conforming use, Town Zoning allowance for such operation.

329. The State could not have issued the existing certification to Plaintiffs as a Boat Dealer without the proper Town Zoning requirements having been met.

330. Other activities engaged in by Plaintiffs and duly "grandfathered", permitted and allowed were challenged or questioned by Defendant LGpC and its staff, and were addressed throughout the permitting and hearing process by Plaintiffs.

331. In their September 1998 response, Plaintiffs incorporated by reference all of their previous submissions and responses to Defendant LGpC.

332. That response of Plaintiffs in no way was intended to concede nor did it assent to agreement with Defendant LGpC with respect to any points not specifically addressed therein.

333. Said response of Plaintiffs was directed specifically only to those issues raised by Defendant LGpC staff and Defendant Auffredou at the August 18, 1998, meeting.

334. Plaintiffs took the position which they continue to hold that the activities which Plaintiffs are authorized to engage, in compliance with law, rules and regulation, have

been duly filed, registered, and noticed as required, with the State of New York, the Town of Queensbury, the Department of Environmental Conservation and Defendant LGpC in conformance with applicable laws, rules and regulations in proper and timely manner.

335. Plaintiffs and their guests, as allowed by the rights flowing to them from Plaintiffs, have engaged in numerous activities legally allowed, a fact which Plaintiffs placed Defendant LGpC on timely and proper notice.

336. Plaintiffs obtained and hold a duly issued non-revocable Permit from the Department of Environmental Conservation which Permit, by its nature and terms has no specified duration.

337. The Class A Marina Permit which now was the subject matter of the prior consideration by Defendant LGpC, its staff and its attorney, would constitute a Revocable Permit of five (5) year duration.

338. Plaintiffs clearly and consistently have stated that the ex post facto enactment of and attempted enforcement of new laws, rules or regulations now is viewed as an attempted limitation of pre-existing, and in this case, also specifically "grandfathered" activities.

339. Plaintiffs maintain that the activities of their marina are, have been and shall continue to be authorized and permitted pursuant to their existing Department of Environmental Conservation non-revocable Marina Permit and that any issue with respect to grandfathering of any activities specified in either or both Plaintiffs' Department of Environmental Conservation permit filing or the Recreational Uses filing with Defendant LGpC itself, are legally authorized and allowed.

340. Plaintiffs also submitted extensive documentary evidence in support of their position along with their

statement of response to Defendant LGpC.

341. Thereafter, upon information and belief, Defendant Auffredou, as counsel for Defendant LGpC, made request for clarification of certain information and for additional information concerning certain matters relating to Plaintiffs' marina operation.

342. By letter dated September 14, 1998, and transmitted via facsimile and mail, counsel for Plaintiffs' responded to the requests of Defendant Auffredou.

343. Information was provided on behalf of Plaintiffs concerning requested additional information relative to the time that various services were offered by Plaintiffs.

344. Said response related that the approximate times of service of the brochures submitted as exhibits were: Lake George Sailing Unit - 1984-1989; Bill and Sally Engelhardt - 1996 - Present Sailing; Bill Robinson - 1997 - Present.

345. Defendant Auffredou also was informed that Plaintiffs had offered other services over the last twenty-five (25) years but the records concerning those activities were not available.

346. Plaintiffs' response also advised Defendant Auffredou that dock space was rented to the specified individuals and no other fees or money are received from such persons or entities.

347. Plaintiffs confirmed to Defendant Auffredou that all of said individuals were registered marina clients.

348. On behalf of Plaintiffs, the willingness to provide additional information and/or documentation again was renewed if Defendant Auffredou or Defendant LGpC had any further inquiries concerning Plaintiffs' marina operation.

349. By correspondence dated September 15, 1998, via Express Mail to Defendant DeSantis, as Chairman of Defendant LGpC, counsel for Plaintiffs forwarded eleven (11) [one (1) each for Defendant DeSantis and each member of Defendant LGpC] copies of a submission of Plaintiffs with respect to the Application for a Class A Marina Permit before Defendant LGpC for Dunham's Bay Lodge provided as a courtesy to Defendant LGpC to facilitate understanding of the position of and additional proof and documentation submitted by Plaintiffs.

350. Defendant DeSantis also was advised by that correspondence that said material previously was provided to Defendant Auffredou as attorney for Defendant LGpC as requested by Defendant Auffredou and staff of Defendant LGpC at the August 18, 1998, meeting between counsel for Plaintiffs and Defendant Auffredou and LGpC staff.

351. In said correspondence, the rights of Plaintiffs were specifically reserved.

352. Defendant DeSantis was advised in said letter that submission of said material was offered in a spirit of cooperation with Defendant LGpC, but in no way constituted a waiver of any right(s), cause(s) of action or legal remedy(ies) available to Plaintiffs.

353. Plaintiffs, in reliance upon the statements made by Defendant Auffredou, Defendant White and Defendant Gallagher at the above mentioned August 18, 1998, meeting with counsel for Plaintiffs, believed that the matter of the previously withdrawn application was not to be considered or discussed at the scheduled meeting of the Committee for August 19, 1998.

354. Plaintiffs, in reliance upon said statements and representations of the above specified Defendants believed that the matter, instead would be considered at the September 23, 1998, Committee meeting.

355. The September 23, 1998, meeting of the Committee was the logical date for the Committee to consider these matters, since, upon information and belief, that would be the first date for meeting of the Committee following the date for submission of the explanatory and additional material by Plaintiffs flowing from the August 18, 1998, meeting.

356. Plaintiff John Salvador, Jr., attended said September 23, 1998, meeting of the Committee accompanied by counsel.

357. According to a "Statement Concerning Purpose & Conduct of LGPC Project Review Committee Meetings" made at the commencement of a certain meeting of the LGpC Project Review Committee, hereinafter referred to as the "Committee", occurring on September 23, 1998, the purpose of that Committee is ". . . to review permit applications pending before Defendant LGpC in order to make recommendations to the full Commission concerning the issuance, modification, or denial of the application as well as any State Environmental Quality Review Act determinations."

358. According to said statement, the Committee is composed of three (3) members of Defendant LGpC and is chaired by Defendant Stewart.

359. Also set forth therein is the policy statement that "Permit Applications are initially received by Park Commission staff and are reviewed by an Environmental Analyst."

360. The statement also sets forth that public comment also is solicited as part of the process.

361. According to that document, the public comment usually is fifteen (15) days, and that, in general, the Committee only makes its decisions concerning "issuance" only after the conclusion of the specified public

comment period.

362. Said policy declaration also specifically stated that while the meetings of the Committee are open to the public, "It should be noted that it is not the purpose of this meeting [referring to the meeting of 9/23/98] to disseminate information to the general public about a particular project not to engage in public debate concerning the merits of any application." [Emphasis added]

363. The Statement went on to specify the procedures which would follow the conclusion of the Committee's meeting, stating as follows: "The recommendations of the Project Review Committee will be taken before the full Park Commission at their next meeting at which time the full Commission will vote on each recommended action."

364. At the conclusion of said policy statement the following language, attempting by unilateral action of Defendant LGpC retroactively to attempt to create revocable permits (including non-LGpC issued permits), recites: "It should be noted that Commission permits may be suspended, modified or revoked for good cause at any time by the Commission."

365. The above language implies that such "suspension", "modification" or "revocation" is may be undertaken by Defendant LGpC without notice or hearing.

366. Defendant LGpC's stated "suspension, "modification" or "revocation" would be by unilateral action of Defendant LGpC.

367. Said policy statement also provided for and contemplated not process for appeal of any such action by Defendant LGpC.

368. Upon information and belief, at said September 23, 1998, meeting of the Committee, the above mentioned

Statement was read or otherwise incorporated into the record of the Committee meeting.

369. Thereafter, a typewritten copy of said statement was obtained from staff of the LGpC on behalf of Plaintiffs.

370. Plaintiffs had been informed by staff of Defendant LGpC that the matter of their pending application was to be considered at the September 23, 1998, meeting of the Committee.

371. At said September 23, 1998, Committee meeting, Plaintiffs learned for the first time that, despite the representations made by Defendant LGpC staff and by Defendant Auffredou to Plaintiffs' attorneys at the meeting held on August 18, 1998, that the matters relating to Plaintiffs would not be considered until the September 23, 1998, Committee meeting of Defendant LGpC to allow time for Plaintiffs to respond to questions raised, including questions raised by Defendant LGpC staff at said August 18, 1998, meeting, the matters invoking Plaintiffs were considered at a certain meeting of the Committee held, upon information and belief, on August 19, 1998.

372. The August 19, 1998, Committee meeting took place even before the date agreed to among counsel for Plaintiffs and Defendant LGpC staff and Defendant Auffredou.

373. Following this revelation, following the conclusion of the Committee meeting of September 23, 1998, by letter dated September 23, 1998, addressed to Defendant DeSantis, as Chairman of Defendant LGpC, Defendant LGpC, its members and staff were reminded on behalf of Plaintiffs that at the April 29, 1998, meeting of Defendant LGpC, Plaintiff John Salvador, Jr. withdrew, on the record the then pending application for a Class A Marina Permit which also had been the subject of discussion at the

September 23, 1998 Defendant LGpC's Project Review Committee.

374. By that correspondence, Defendant DeSantis and Defendant LGpC also were reminded on behalf of Plaintiffs that, since the April 29, 1998, withdrawal of said application, Plaintiffs continued to work in a spirit of cooperation with Defendant LGpC and its staff to resolve various outstanding issues with respect to said original Class A Marina Permit Application.

375. Plaintiffs, Defendant DeSantis and Defendant LGpC were informed, continued to take the position that said original application is withdrawn, despite conflicting statements both on and off the record made by or on behalf of Defendant LGpC.

376. Defendant DeSantis and Defendant LGpC were informed that many of the items in contention remained unresolved.

377. Plaintiffs also advised Defendant DeSantis and Defendant LGpC that it was Plaintiff' intention to submit a new Class A Marina Permit Application to Defendant LGpC, but that Plaintiffs' prior Application remained withdrawn as stated by Plaintiff John Salvador, Jr. on the record on April 29, 1998, at the meeting of the LGpC.

378. Defendants DeSantis and the LGpC were informed that since that application remained withdrawn, Plaintiffs would not be participating in the scheduled meeting of Defendant LGpC on September 29, 1998.

379. Upon information and belief, at the time of said correspondence, there was an agenda item with respect to the application of Plaintiffs on Defendant LGpC's schedule for the September 29, 1998, meeting.

380. Defendant DeSantis and Defendant LGpC were reminded that, the applicant, here Plaintiffs, can legally

withdraw an application at any time prior to final action.

381. A request was made in said correspondence on behalf of Plaintiffs that documentation be provided by Defendants that the agenda item relating to Plaintiffs' application was withdrawn from consideration prior to the date of the September 29, 1998, meeting of Defendant LGpC.

382. On behalf of Plaintiffs, Defendant LGpC was informed that a new Class A Marina Permit application would be submitted to the Commission when completed based upon all existing facts and any additional information obtained as a result of the September 23, 1998, Committee meeting.

383. Defendant LGpC was informed on behalf of Plaintiffs, that Plaintiffs intended to continue to function, as in the past, under the irrevocable Permit previously issued by the Department of Environmental Conservation, Defendant LGpC's supervising parent agency.

384. Based upon representations made to Plaintiffs by Defendants, it was the understanding of Plaintiff that the matter of a Class A Marina Permit application relating in any manner to Plaintiffs would not be considered by Defendant LGpC at a certain meeting of the LGpC held on August 18, 1998, to allow for submission of additional material by Plaintiffs, pursuant to discussions between Plaintiffs' attorneys and representatives of Defendant LGpC, specifically Defendants White, Gallagher and Auffredou.

385. At a certain meeting of the Project Review Committee, at which Plaintiffs had been informed the matter of a Class A Marina Permit relating to their property would be considered based upon the submission of additional material as specified at said August 18, 1998 meeting, Plaintiffs learned that the matter of said Class A Marina Permit, instead had been considered and dealt with at the August 19, 1998, meeting.

386. Plaintiffs also learned for the first time at said Project Review Committee meeting that Defendant Gallagher had, on behalf of Defendant LGpC, unilaterally rewritten said Permit and that it had been put "in the mail" to Plaintiffs so that it would be received by Plaintiffs only after the conclusion of the September 23, 1998, Project Review Committee Meeting.

387. Plaintiffs also learned, therefore, that the information considered by Defendant LGpC at the meeting at which the content of said "Revised" Permit was determined could not possible have included the material provided by Plaintiffs in response to issues raised by Defendant LGpC which were discussed with Plaintiffs attorneys at the above mentioned August 18, 1998 meeting with Defendants White, Gallagher and Auffredou.

388. The responses, which had been submitted within the time frame agreed to at said meeting related to the specific issues/objections raised by Defendant LGpC, Defendants White, Gallagher and Auffredou.

389. Upon information and belief, at the meeting at the offices of Defendant LGpC held on August 18, 1998, was clearly stated by Plaintiffs' attorneys as in no way or manner to be deemed agreement to, conceding of or reinstatement with respect to the previously pending application of Plaintiffs.

390. Upon information and belief, the underlying basic issue of Defendants LGpC, White, Gallagher and Auffredou focused upon the scope of legal authority of Defendant LGpC.

391. Plaintiffs contended and do contend that by regulation 6 NYCRR Part 646 dated July 3, 1981, Defendant DEC, pursuant to the authority legislatively granted and delegated to Defendant DEC authority over owners of marina facilities situated on Lake George were required to

complete an application for a non-revocable Permit to Operate a Marina on Lake George.

392. As above set forth, Plaintiffs duly complied with all applicable requirements relating to the operation of such marina and the obtaining of the required non-revocable permit.

393. Plaintiffs continue to operate their marina to the date hereof under, by virtue of and in accordance with said Non-revocable Marina Permit issue to them by Defendant DEC.

394. As above specified, Plaintiffs also complied with the Registration of Recreational Uses when requested.

395. Defendant LGpC challenged the grandfathering of certain specific activities previously conducted, documented, permitted to and registered by Plaintiffs.

396. Specifically, the activities challenged by Defendant LGpC include Balloon/parasail, PWCs, and sales and service of boats.

397. In responding to the issues raised by Defendant LGpC, Plaintiffs have constantly attempted to traverse Defendant LGpC's regulatory maze and have consistently complied with each and every, requirement, filing and registration mandated by the ever-changing Commission laws, rules and regulations.

398. Plaintiffs consistently and continually have relied upon the grandfathering of each and every activity so filed, registered, and documented as required by the DEC and its statutory successor(s) in interest.

399. Plaintiffs in their original Application for a Permit to Operate a Marina to Defendant DEC the application grandfathering the marina operation at that location dating back over twenty-five (25) years prior to that Application, Plaintiffs applied to DEC and were granted a

non-revocable Permit to Operate a Marina specifying services provided including, in part: Sale or rental of Water Craft (undefined and unlimited by the application and regulatory definition); Sale or rental of Marine Products; Rental, Lease or accommodation for Boats not Registered to the Owner (also undefined and unspecified by application form and/or regulation); Parking Spaces for 75 Customer Vehicles; Trash Receptacles; Rest Room Facilities; and 67 boat slips.

400. Plaintiffs provided to Defendant DEC, the proper issuing authority, all material requested, and Plaintiffs were granted the non-revocable permit in accordance and based upon the terms of said application.

401. In 1990 Plaintiffs again duly complied with the regulatory requirements of registration of recreational uses, specifying in detail the recreational uses engaged in prior to the regulatory enactment, at their facility by the "owners" and their guests while using the facilities offered by Plaintiffs.

402. In said registration, responding to the vaguely worded regulatory demand for registration, Plaintiffs specified, with respect to several particular activities, that while they did not themselves provide the equipment for their guests to engage in certain specified activities, either the guests themselves or other guests had provided, for fee or otherwise, and in the future would provide such equipment or mechanisms for engaging in such activities.

403. With respect to the activities involving Balloon/parasail, PWCs, and sales of boats Plaintiffs in said registration specified as follows: Under sub-heading of said registration titled "(2) Offering of Parasailing Rides" "Balloon" one (1) "engaged in" and under the sub-heading "(The Operation of a Seaplane" "Balloon" "0" "Owned - "0" "Operated" but "engaged in" one (1) by the facility and

others by Guests.

404. Plaintiffs position is and has been that the activities of their marina are, have been and shall continue to be authorized and permitted pursuant to their existing Defendant DEC non-revocable Marina Permit and that any issue with respect to all legally pre-existing activities specified in either or both their DEC permit filing or the Recreational Uses filing with Defendant LGpC itself, continuing to be legally authorized and allowed.

405. By Resolution No. 98-69 of Defendant LGpC dated September 29, 1998, Defendant LGpC acted upon the application which Plaintiffs repeatedly had withdrawn starting on April 29, 1998.

406. Said Resolution referred incorrectly to Dunham's Bay Resort Corp., Inc. despite the fact that Plaintiffs repeatedly had informed Defendant LGpC, its employees and its attorney of the identification of the applicant.

407. In said Resolution, Defendant LGpC acknowledged the fact that Plaintiffs' facility had been issued a marina permit by the Department of Environmental Conservation.

408. Said Resolution only recited the letter of September 23, 1998, withdrawing Plaintiff's application to Defendant LGpC.

409. Said Resolution did not acknowledge the verbal withdrawal of application by Plaintiff John Salvador, Jr. on the record at the April 29, 1998, meeting of Defendant LGpC.

410. Defendant LGpC in said resolution also incorrectly stated that Plaintiffs' facility only commenced in 1997.

411. At the time at which the staff of Defendant LGpC conducted site inspection of Plaintiffs' facility, they

did not observe PWCs on site due to the fact that PWCs were in winter storage at that time, a situation which Plaintiffs' had informed Defendant LGpC staff of at the time of said inspection.

412. Additionally, Defendant LGpC's Resolution incorrectly stated that the rental of PWCs was not an activity by the Department of Environmental Conservation permit under and by virtue of which Plaintiffs operate their facility.

413. Defendant LGpC's Resolution also states as fact the incorrect premise that Plaintiffs purportedly extended their wharfs from twenty-four (24) to thirty (30) feet in length.

414. As Plaintiffs had repeatedly informed Defendant LGpC and its staff, the extension of the docks in question was duly authorized and permitted by the Department of Environmental Conservation.

415. All applicable applications were timely and properly made by Plaintiffs to the applicable regulatory authority at the time, that being the Department of Environmental Conservation.

416. No extensions of docks was done by Plaintiffs without first having all applicable permits and authorizations.

417. In fact, commencing in 1988, Defendant LGpC charged Plaintiffs for dock registration fees based upon said docks being thirty (30) feet in length.

418. Defendant LGpC continually assessed Plaintiffs on the basis of the thirty (30) foot length docks and to demand payment based on said linear footage.

419. Defendant LGpC accepted payment from Plaintiffs for thirty (30) foot dock length for said docks.

420. The thirty (30) foot length of said docks was

grandfathered by the Department of Environmental Conservation permitting previously legally approving said dock extensions.

421. In said resolution Defendant LGpC unilaterally stated that while Defendant LGpC acknowledged the withdrawal of said application by Plaintiffs, Defendant LGpC claimed that such withdrawal did not "negate" Defendant LGpC's jurisdiction over the "subject facility".

422. Further statements contained in Defendant LGpC's Resolution set forth a specific finding that ". . . the continued operation of the subject facility without a Class A marina permit from the Commission is a violation of Commission regulations, . . .". [Emphasis added]

423. Said resolution went on to find that ". . . the NYSDEC marina permit for the subject facility was superseded by the enactment of the Commission's regulations applicable to Class A marinas on June 3, 1988, . . .".

424. Defendant LGpC in said resolution did not even attempt to justify the alleged "superseding" of an existing permit granting to Plaintiffs a valid property right.

425. Defendant LGpC did not even attempt to allege any notice to Plaintiffs of the alleged "superseding" of or elimination of Plaintiffs' existing rights.

426. In a vain attempt to deal with the effective attempted termination of Plaintiffs' rights, Defendant LGpC, in a back-handed statement ". . . acknowledges that the NYSDEC permit may be utilized to establish a baseline level of marina activity offered at the subject facility which would form the basis of a Class A marina permit from the Commission, . . .".

427. Defendant LGpC, did not, however, acknowledge or admit that Plaintiffs' existing and continuing permit from the Department of Environmental

Conservation allowed Plaintiff to continue their operation as legally authorized, permitted and approved by the appropriate permitting entity.

428. Defendant LGpC cannot by attempted ex post facto legislation and/or attempted application to Plaintiffs deny Plaintiffs of a validly existing property right and liberty interest.

429. Defendant LGpC, in said resolution also incorrectly made a finding that ". . . the offering of PWC rental at the subject facility constitutes an expansion of the subject facility. . ." and Defendant LGpC required a further permit for such operation.

430. Despite the clear documentation presented by Plaintiffs of the pre-existing timely authorization of PWC rental at Plaintiffs' facility by the appropriate permitting governmental entity, Defendant LGpC specifically ignored the facts as they existed with respect to Plaintiffs.

431. Defendant LGpC, in said resolution also incorrectly set forth a finding that the wharfs ". . . have been extended and/or modified without a permit, the permits are maintained in violation of the permit requirements and design standards of 6 NYCRR Part 646, . . .".

432. As set forth elsewhere in this Complaint, Plaintiffs specifically detailed in their proof to Defendant LGpC Plaintiffs timely compliance with the applicable provisions of law, rule and regulation.

433. Prior to any extension of wharfs by Plaintiffs, Plaintiffs first obtained the necessary permits and authorizations from the Department of Environmental Conservation, the governmental entity charged with the duty of regulating such extensions.

DESPERATE TREATMENT OF PLAINTIFFS BY

DEFENDANTS, INCLUDING DEFENDANT LGpC

434. Upon information and belief, on or about August 21, 1996, application was made to Defendant LGpC for a Class A Marina Permit by Frank J. Parillo, hereinafter referred too as the "Parillo Application".

435. Upon information and belief, on or about the 12th day of March, 1991, Frank J. Parillo, hereinafter referred to as "Parillo", or his agent(s) recorded a deed purporting to acquired title from the Estate of an Allison Ellsworth to certain real property located in the area more commonly referred to as Dunham's Bay, Lake George.

436. Upon information and belief, on or about the 31st day of October, 1985, Parillo, or his agent(s) recorded a deed purporting to acquired title from an Robert Ellsworth to certain real property located in the area more commonly referred to as Dunham's Bay, Lake George.

437. Upon information and belief, during approximately 1989, Parillo sought a zoning variance from the Town of Queensbury Zoning Ordinances then in effect, specifically designated as Use Variance No 98-1989.

438. Upon information and belief, said application dealt with exemption sought from various zoning provisions on the claim of "pre-existing use" by Parillo.

439. Upon information and belief, in support of said Use Variance Parillo submitted an affidavit entitled "Affidavit to Demonstrate Pre-Existing Use", sworn to on September 20, 1989.

440. Upon information and belief, as is set forth in said Affidavit no reference is made to any existing permit in the name of Robert Ellsworth.

441. Upon information and belief, based upon the

records of the Town of Queensbury, in addition to said affidavit in support of application Parillo also submitted a form designated as "14-16-4 (2/87)- Text 12" and titled "617.21, Appendix C, State Environmental Quality Review, Short Environmental Assessment Form, For Unlisted Actions Only", with two (2) page attachment thereto.

442. Upon information and belief, although said Environmental Assessment Form is unsigned, the copy of said document submitted herewith is in the form as obtained from the records of the Town of Queensbury, and a portion of the record upon which the Town of Queensbury Zoning Board based its determination in the matter of the application of Parillo for a use variance.

443. Upon information and belief, in Paragraph "III" of the attachment, specifically refers to one (1) existing permit from Defendant LGpC only held by Parillo and also specifies that "nor are commercial boat repairs conducted on the property."

444. Upon information and belief, said document purports to set forth the entire operation run by Parillo and clearly does not establish or even allege the existence of any permit issued to Robert Ellsworth pursuant to which Parillo claimed any right to operate.

445. Upon information and belief, according to correspondence from Karl E. Parker of Defendant LGpC addressed to Lee York of Defendant Town of Queensbury dated October 25, 1989, concerning the above referred to Zoning variance application of Parillo, reference therein by Defendant LGpC clearly indicated the existence of only one (1) permit for the areas involved, that being the Allison Ellsworth permit, identified therein as marina permit #50-82-0146.

446. Upon information and belief, according to the terms of the Allison Ellsworth permit and the application

submitted by Allison Ellsworth in support thereof the underlying application and, therefore, the permit resulting therefrom, relates to 95 vessels, which vessel count specifically included ten (10) vessels on the lake, not in the brook, in that count.

447. Upon information and belief, in considering the above mentioned Parillo Zoning variance application, testimony and submissions were taken by the Queensbury Zoning Board of Appeals at their second regular meeting held on December 27, 1989.

448. Upon information and belief, based upon the minutes of said Zoning Board meeting, at said meeting testimony and submissions were taken on the record concerning the Parillo (then pending) application and specific reference to the marina operations by Parillo were made by or on his behalf.

449. Upon information and belief, a person identified in the minutes of said meeting to be a Mr. Richards, speaking on behalf of Parillo at said meeting detailed the marina operations and explained the acquisition process from both Allison Ellsworth and Robert Ellsworth.

450. Upon information and belief, continuing in support of the Parillo zoning variance application, in the presence of Parillo and at Parillo's behest, Mr. Richards went on to state according to said minutes, in pertinent part:

> MR. RICHARDS-Stated what we've got is a permit. I think Allison Ellsworth had a permit. Frank had applied to have the permit transferred over to him which he received this Spring. In his application he estimated a boat launch of 20+- boats a day and that's where the figure

> comes from. That was part of his application when the permit was given.

451. Upon information and belief, continuing in support of his zoning variance application, Parillo stated in his presentation to the Queensbury Zoning Board of Appeals also supporting the existence of only one (1) marina permit according to the minutes of said meeting, as follows:

> MR. PARILLO-Stated we didn't examine any records. You want to keep in mind that the Ellsworth's [sic.] were over 80 years old. We signed the contract to divide this in 1988 under the assumption that the launch was an intrical [sic.] part of the marina, that it could be reopened. It was never advised that it couldn't be. I had conversations with Dave Hatin and until the day which was, I believe, in July, we were under the assumption that it was a part of the marina and that there would be no problems. We got the permit transferred from DEC. There was a year lapse from the time we signed the contract until we bought it because Mr. Ellsworth [Allison] had passed away. To answer your question, there weren't any records to examine.

452. Upon information and belief, the Queensbury Zoning Board thereafter acted, in reliance upon the

information, evidence and testimony provided to the by and on behalf of Parillo and summarized their finding in Motion and action there on December 27, 1989.

453. Upon information and belief, thereafter, in support of Parillo position with respect to Parillo's marina operation, John W. Caffrey provided an Affidavit sworn to December 2, 1992, wherein specific reference is made to the authority pursuant to which Parillo operated his marina, said authority resting solely upon the transfer of the above referenced Allison Ellsworth permit.

454. In the early 1990's Plaintiffs filed requests under the Freedom of Information Law, hereinafter referred to as "FOIL", requests filed by Plaintiffs with (Defendant LGpC and/or Defendant DEC requesting copies of all Marina permits issued by them as of the date thereof for all marinas operating on Lake George, including but not limited to the area on or abutting Lake George more commonly known as Dunham's Bay.

455. On or about the 11th day of October, 1996, Plaintiffs received response to one of their above mentioned FOIL request from LGpC.

456. Included in said FOIL request response received by Plaintiffs was a copy of a marina permit purportedly issued to Allison Ellsworth (permit no 50-82-0146) on December 20, 1982 by the Defendant DEC.

457. Included in said FOIL request response received from the LGpC was a copy of an alleged transfer of the marina permit purportedly issued to Allison Ellsworth on December 20, 1982, by Defendant DEC transferred to Parillo by Defendant LGpC on June 20, 1989.

458. Nowhere in response to the FOIL request was there included any marina permit for Robert Ellsworth.

459. Upon information and belief, in the Parillo

application for Permit made to the LGpC Parillo specifically identified by tax parcel identification number those parcels for which and in relation to which his application was made, nowhere in said permit application by Parillo is the tax map identification number for the parcel acquired by Parillo from Robert Ellsworth included.

460. Upon information and belief, said application as made by Parillo, on page two of the application it is specifically limited to prior permit or registration of Mabel and Allison Ellsworth, no reference is made therein to any alleged permit held by Robert Ellsworth.

461. By Notice which Plaintiffs received from Defendant LGpC dated August 1, 1996, Plaintiffs became aware of the fact that Parillo had applied to Defendant LGpC for what was identified therein to be a "Class A Marina Permit".

462. Said Notice received by Plaintiffs contained no reference to claim of two (2) purportedly existing permits transferred to Parillo.

463. By letter dated August 21, 1996, Plaintiff John Salvador, Jr. responded to the LGpC to the Notice concerning the Parillo application.

464. Prior to that time, Parillo had commenced litigation against Plaintiffs claiming title to certain docks which Parillo operated on property titled in Plaintiffs and to which he made claim under color of title through Quit Claim Deed, which litigation went to trial and judgment with order dated October 30, 1996.

465. A copy of decision and order of Judge Moynihan in said action was made a part of the record before the LGpC at the committee meeting held on February 19, 1997 at 1:00 P.M. at the Lake George Town Hall.

466. In that decision the Court held that Parillo did

not have title to the land on which said docks were situated.

467. Other statements contained in said decision and order were beyond the scope of the matters at issue in the trial and the gratuitous comments contained therein are not law of the case nor are they res judicata as to the issues set forth therein; rather, they constitute non-binding dicta.

468. Thereafter, Parillo filed a Notice of Appeal of said Order.

469. After the appeal was perfected by Parillo and heard by the Appellate Division, the decision of Judge Moynihan was altered somewhat and returned to Judge Moynihan for further proceedings what have not occurred as of the date hereof.

470. No stay pending appeal of said Order ever was sought or obtained by Parillo, to allow his continued use of said parcel under claim of right of title contrary to the statements made by Mr. Sweeney at the above referenced February 19, 1997, meeting.

471. Upon information and belief, with reference to the issue of "quick launch" which was considered by Defendant LGpC with respect to the Parillo application, Plaintiffs requested any information submitted by Parillo in accordance with the requirements for registration of recreational uses which has been mandated for such users.

472. Plaintiffs did not receive from Defendant LGpC any information supplied by Parillo for consideration of such submission and registration of Parillo.

473. Plaintiffs also pointed out to Defendant LGpC in their consideration of the Parillo application the fact that other issues remained outstanding and unresolved, including but not limited to the issues raised by the Town of Queensbury through its representative James Martin, in his letter to Defendant Gallagher of Defendant LGpC dated

August 21, 1996.

474. Upon information and belief, the proposed submission of Parillo as considered by Defendant LGpC would constitute an expansion of the previously allowed use as allowed in accordance with the Town of Queensbury ordinances and rules.

475. Upon information and belief, Parillo did not submit an adequate parking plan to Defendant LGpC.

476. Upon information and belief, a map with generalized markings indicating vague locations and number of "cars" was considered by the sub-committee of Defendant LGpC, such map clearly did not constitute a "parking plan".

477. Upon information and belief, no designation of size and location of parking spaces, traffic isles, allowing adequate space for backing and turning and specification of methods and designated areas of ingress and egress in conformance with standards as set forth in generally accepted AASHTO guidelines and specifications was submitted or considered by Defendant LGpC with respect to the Parillo application.

478. Upon information and belief, Defendant LGpC was placed on notice by Richard J. Cipperly of Defendant DEC of serious outstanding issues which, as stated by Mr. Cipperly in his letter to Defendant LGpC dated September 25, 1996, in which he stated in pertinent part, ". . . would ask the Commission to delay any new or renewal [of Parillo permits] until the ownership issue is resolved . . . ."

479. Upon information and belief, thereafter, the matter of said application came on before Defendant LGpC for consideration.

480. Plaintiffs attended certain public meetings of Defendant LGpC at which the Parillo Application was an

agenda item.

481. At the meeting held on June 25, 1997, Plaintiffs were in attendance, and information was presented by them and on their behalf with respect to the position of Plaintiffs concerning the Parillo Application.

482. Written statements also were submitted by and on behalf of Plaintiffs with respect to the Parillo Application.

483. One (1) issue raised by and on behalf of Plaintiffs with respect to the Parillo Application related to the wharf registration compliance of the Parillo predecessor(s) in interest.

484. Upon information and belief, the wharf registration of Allison Ellsworth underlying the issuance of the Parillo Class A Marina Permit was unsigned and the verification thereon had been stricken.

485. Upon information and belief, despite the fact that the form was signed on behalf of Defendant DEC by Defendant White accepting the registration form.

486. It was and is Plaintiffs' position that any permit(s) flowing from the above mentioned registrations and permit(s) were and are inherently defective and, therefore, void ab initio.

487. Since, as Defendant Auffredou stated at the June 25, 1997, meeting, the Marina Permits run with the land, transferring to the succeeding property owner, Plaintiffs contended to Defendant LGpC that the only rights which are and have been in the past transferred to Parillo were and are those legally pre-existing uses which he operates under and by virtue of his predecessors in title and interest, specifically, Allison Ellsworth and Robert Ellsworth.

488. Plaintiffs argued to Defendant LGpC that, if the initial filing (Allison Ellsworth's unsigned and unverified

initial registration) was and is defective, no rights can flow to Parillo from such void initial filing.

489. Plaintiffs raised the issue to Defendant LGpC that a civil servant (Defendant White), acting ultra vires, purportedly on behalf of Defendant DEC, cannot unilaterally correct such inherent underlying defect.

490. Plaintiffs also raised the issue to Defendant LGpC that no notice was given to Plaintiffs or to any other members of the public or affected parties of the intention of Defendant LGpC to "merge" two (2) permits, specifically the Allison Ellsworth and the Robert Ellsworth permits.

491. Plaintiffs pointed out to Defendant LGpC that this issue was raised specifically at the February 19, 1997, meeting of Defendant LGpC reviewing the Parillo application for a Class A Marina Permit.

492. The issue concerning the expansion of said permit also was raised at the February 19, 1997 meeting.

493. Plaintiffs also referenced additional information obtained from the tax record cards relating to the both the Robert Ellsworth property and the Allison Ellsworth property clearly establishing the uses which the prior owners of the property in question claimed for said property and established the basis upon which the parcels were taxed by the applicable municipalities.

494. Plaintiffs presented to Defendant LGpC the fact that the tax records determine the only use which one of the prior owners, specifically Robert Ellsworth, which relates in any way to the uses claimed to be prior commercial uses in the Parillo Application, is the operation of a limited number of docks (less than asserted to be the base dock use number in the Parillo permit for the former Robert Ellsworth property) and operation of a marine gas pump.

495. Upon information and belief, based upon the

material contained in the above mentioned tax records, it was presented by Plaintiffs to Defendant LGpC that it appeared that the marine gas pump operation was abandoned by Robert Ellsworth well before the termination of his ownership of the property.

496. Plaintiffs, therefore, contended to Defendant LGpC that, according to those tax records, there was only limited commercial use of the Allison Ellsworth property in question, prior to the conveyance of the property out of Allison Ellsworth and not at the levels claimed by Parillo.

497. Plaintiffs also pointed out to Defendant that no statutory authority exists for the purported attempted merger by the Commission of Robert Ellsworth and Allison Ellsworth permit in Parillo.

498. Plaintiffs further referred Defendant LGpC to testimony of Parillo before the Town of Queensbury Zoning Board of Appeals in a related matter previously before that body, and, upon information and belief, statements made to that body by Parillo in apparent contradiction to the position taken by Applicant Parillo before Defendant LGpC.

499. Plaintiffs also referred Defendant LGpC to issues previously raised before the sub-committee of Defendant LGpC concerning parking, safety factors and hazardous conditions created as a result of such parking, specifically relating to parking along the Bay Road (County road by use) right-of-way, adequacy of size of parking spaces, and jurisdiction of Defendant LGpC, the Town of Queensbury, Defendant DOT and other applicable entities.

500. Plaintiffs further asked Defendant LGpC to direct its attention to questions regarding the property line(s) in the area of the brook and the docks along the brook which also are the subject of the Parillo Application, the proper location of property lines in the area of the brook, Plaintiffs contended, is key to determination as to the valid

and proper existence of many of the docks in that area.

501. Plaintiffs informed Defendant LGpC that the proper location of that line is key to determining whether or not certain of the Parillo docks in question are on the lands of the State of New York and specifically in areas designated as Forever Wild, areas designated as Critical Environmental area, and/or lands of the Forest Preserve.

502. At the June 25, 1997, meeting Defendant LeBarron specifically was requested to consider the significance of this issue as the representative of Defendant DEC Commissioner and Defendant DEC.

503. Plaintiffs reported to Defendant LGpC that it was and is their belief that a survey of the area in question is or should be in the possession of Defendant DEC, the successor in interest to a least a portion of said property from the Nature Conservancy which took title from Plaintiffs.

504. Plaintiffs pointed out to Defendant LGpC that ownership of the underlying title is essential to the validation of the issuance of any Marina Permit(s) by Defendant LGpC for the area in question.

505. Plaintiffs pointed out to Defendant LGpC that specifically at issue is the location of the property line either at the center of the brook or on the East bank.

506. At that time, Plaintiffs brought to the attention of Defendant LGpC the fact that critical to the determination of the status of the Parillo Class A Marina Permit was the determination of the applicable jurisdiction of overlapping State and Municipal entities.

507. Plaintiffs contended that definition of lines of responsibility for issues of zoning, permitting and title determination needed to be resolved before permit issuance in accordance with all applicable laws, rules and

regulations.

JURISDICTION

508. This is an action of law to redress the deprivation under color of statute, custom or usage of a right, privilege and immunity secured to Plaintiffs by the Fourteenth Amendment to the Constitution of the United States and Title 42 of the United States Code, The Public Health and Welfare, Section 1983, and arising under the laws and statutes of the State of New York.

509. This is also an action of law to redress the deprivation through a conspiracy on the part of Defendants acting under color of statute, custom, and usage of a right, privilege and immunity secured to the Plaintiffs by Title 42, Section 1985(3) arising under the laws and statutes of the State of New York.

510. This is also an action under the First Amendment, Fourth Amendment and Fifth to the Constitution of the United States and Title 42 of the United States Code, The Public Health and Welfare, Section 1983, and 1985.

511. This is also an action under the Fourteenth Amendment to the Constitution of the United States and Title 28 of the United States Code, The Public Health and Welfare, Section 1983, and 1985(3).

512. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sections 451, 1331, 1337, 1343 and 1345.

513. The actions of Defendants, both individually and collectively, have violated Plaintiffs' rights of free speech, freedom of association and freedom to petition government under the First and Fourteenth Amendments of

the United States Constitution.

514. The actions of Defendants, both individually and collectively, have violated the rights of Plaintiffs to petition the government.

515. The actions of Defendants, both individually and collectively, have violated the rights of Plaintiffs in the conduct of their business and said acts of Defendants are in violation of Plaintiffs' rights under 15 U.S.C Section 1 in restraint of trade.

516. The actions of Defendants, both individually and collectively, have violated Plaintiffs' rights by in derogation of the Article 1, Section 9, Clause 3 of the United States Constitution by applying to Plaintiffs ex post facto law and regulation.

517. The actions of Defendants, both individually and collectively, have violated Plaintiffs' rights in derogation of the commerce clause of the Untied States Constitution, Article 1, Section 8, Clause 3.

518. All of the acts alleged herein were committed by the Defendants herein within the territorial jurisdiction of the Northern District of New York.

519. Proper venue is in this Court as the unlawful action occurred within this District.

AS AND FOR A FIRST CAUSE OF ACTION, PLAINTIFFS ALLEGE

520. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "519" of this Complaint as if more fully and at length set forth herein.

521. Defendants herein have individually and collectively acted in such a manner as to create a negative business environment for the Plaintiffs herein, despite repeated efforts made by Plaintiffs to seek only the rights due Plaintiffs.

522. Those efforts of Defendants even expanded beyond just the taking of Plaintiffs's property by their effective seizure of Plaintiffs's property interests, but also expanded to place Plaintiffs, commercial operation and personal reputation up to ridicule by the public with the charges and legal threats and allegations made against Plaintiffs and by placing Plaintiffs "on display" as an object of ridicule with respect to the uses to which they put their property by making such matters the subject of legal proceedings purportedly for the purpose of engaging in regulatory enforcement.

523. These actions have placed the Plaintiffs in a position where they are threatened with the loss of their Marina Permit through and enforcement action based upon false charges to be prosecuted by Defendants following the Defendants' initial and continuing illegal and unconstitutional actions of keeping their from proceeding with legal uses of their property.

524. Defendants herein have purposely carried on efforts to intimidate and harass the Plaintiffs by using every means up through and including threat of seizing their business and personal property, thereby making Plaintiffs' continued business operation all but untenable.

525. This discrimination by Defendants is carried on under color of State law and under color of custom and usage enforced by the officials of Defendant LGpC.

526. The actions of Defendants complained of have caused Plaintiffs to be threatened with the loss of their legally granted marina permit issued which is integral to

their business, to incur expenses and to suffer damage to their business, loss of potential future business and business reputation as well as personal anger and stress.

AS AND FOR A SECOND CAUSE OF ACTION, PLAINTIFFS ALLEGE

527. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "526" hereof as if more full and at length set forth herein.

528. The actions of Defendant Auffredou and the individual Defendants violated Plaintiffs' right of free speech under the First and Fourteenth Amendments of the United States Constitution.

529. Plaintiffs have, as citizens of the United States, residents of the State of New York and resident within the territorial boundaries of the Town of Queensbury raised issues concerning improper use of power and authority by officials of Defendant LGpC and raised issues concerning the inequitable application of ordinances and rules by Defendant LGpC and officials, agents, servants and employees of Defendant LGpC with respect to resident and land owners targeted by Defendants within their jurisdictional boundaries, all based upon Plaintiffs' personal knowledge of applicable facts.

530. Plaintiffs also challenged certain actions of officials of the State of New York, members of the same political party to which individual Defendants named herein owe their allegiance and from which political party said individual Defendants derive their political power.

531. Plaintiffs's actions with respect to appointed State officials resulted in Plaintiffs challenging actions taken against them by those persons in several legal forums,

including but not limited to the New York State Supreme Court and Defendant LGpC itself.

532. The above actions of Plaintiffs were and are matters of public record.

533. It was following and during the course of Plaintiffs' challenges to the bureaucratic then entrenched hierarchy of Defendant LGpC that Defendants commenced the above actions against Plaintiffs.

534. The actions of Defendants effectively placed Plaintiffs under threat of legal prosecution and seizure of assets.

535. All of the above recited actions of Defendants are in direct derogation of State Law, Rules, Regulations and policy and applicable Federal Law.

536. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A THIRD CAUSE OF ACTION OF ACTION, PLAINTIFFS ALLEGE

537. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "536" hereof as if more full and at length set forth herein.

538. Plaintiffs found themselves the objects of Defendants' actions whereby Plaintiffs was more closely scrutinized than other similarly situated property owners within the territorial limits of Defendants LGpC through selectively enforcing the Regulations of Defendant LGpC.

539. Plaintiffs were ostracized by the individual

Defendants while attempting to construct a pretextural reason for forcing them to close their business, all while attempting to provoke Plaintiffs enough to create a pretext for enforcement actions against them and making every attempt to undermine the basic rights to which Plaintiffs are entitled under the Constitution.

540. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A FOURTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

541. Plaintiff repeat and reallege each and every allegation contained in paragraphs "1" through "540" hereof as if more full and at length set forth herein.

542. The actions of Defendants LGpC were maliciously designed to bring discredit upon the Plaintiffs before their family, friends, neighbors and associates.

543. Through the public charge of Defendant LGpC, its employees and agents that Plaintiffs had illegally constructed dock extensions which Defendants alleged were in violation of the law and was a planned, calculated attempt to maliciously, publicly to slander and libel the Plaintiffs.

544. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A FIFTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

545. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "544" hereof as if more full and at length set forth herein.

546. Plaintiffs found themselves the object of a review process which actually was an investigation which superficially, upon information and belief, was described as being an investigation into the actions of a property owner trying to preserve their property in the face of continual regulatory enforcement by Defendant LGpC.

547. The actions of Defendant LGpC, its employees and agents in failing to "grandfather" prior existing recreational uses constitutes an ex post facto regulation in violation of the Untied States Constitution.

548. The actions complained of in this Complaint were a result of Plaintiffs's opposition to the illegal and improper practices of the Defendants which they reasonably believe to be a clear form of retaliation against them.

549. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential business and damage to their business reputation as well as personal anger and stress.

AS AND FOR AN SIXTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

550. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "549" as if fully set forth herein.

551. Pursuant to the requirements of the Town of Queensbury's Zoning Code in its application and interpretation thereof as applied to Plaintiffs' property is another example of the actions of Defendants impinging on and violating the rights of Plaintiffs.

552. At all times hereinafter mentioned, Plaintiffs as a property owners within the Town of Queensbury and citizens of the United States, Plaintiffs were and are entitled to the privileges and immunities afforded their as a result of said citizenship.

553. Upon information and belief, Plaintiffs' property has been targeted by the Town of Queensbury, its employees and agents, for specific action not authorized by or contemplated in the existing zoning scheme of the Town of Queensbury at the request or direction of Defendant LGpC.

554. Defendant LGpC and the Town of Queensbury, acting at Defendant LGpC's request or direction, knew or had reason to know that the acts of selective enforcement and excessive regulation would cause Plaintiffs damage.

555. Plaintiffs were singled out by Defendants for abusive action in retaliation for their course of conduct seeking to obtain the rights and privileges to which they were and are entitled.

556. Defendants knew or had reason to know that Plaintiffs were engaged in a commercial business whose clientele come from throughout the Untied States and from foreign countries.

557. Defendants engaged in a course of conduct of continuous harassment, the end result of which was to interfere with and reduce Plaintiffs' business in violation of the Commerce Clause of the United States Constitution.

558. As a direct result of the actions complained of

Defendants both individually and collectively, Plaintiffs suffered damage.

559. Upon information and belief, Defendants' violation of Plaintiffs' rights is a proximate cause of injury to Plaintiffs.

560. The injuries sustained by Plaintiffs were not due to any contributory negligence on behalf of Plaintiffs.

561. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A SEVENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

562. Plaintiffs repeat and reallege each and every allegation contained in paragraphs numbered "1" through "561" hereof as if more fully and at length set forth.

563. Upon information and belief, Defendants are liable for tort in said Defendants' adoption of an inadequate and inherently defective regulatory system which is overlapping, conflict ridden and excessive the legislative authority given them

564. Upon information and belief, Defendants are liable for tort in said Defendants' inequitable application of Defendants Regulations with respect to Plaintiffs.

565. Upon information and belief, at all times mentioned herein, Defendants failed to use even slight care in said Defendants' duty to protect and fully warn Plaintiffs as a property owners within Defendants' zone of influence of the intended application of its legally defective and ambiguous regulatory system with respect to Plaintiffs and

engaged in conduct that is so careless as to show complete disregard for the rights and safety of Plaintiffs.

566. Upon information and belief, Defendants are liable for gross negligence.

567. Upon information and belief, Defendants are also liable for willful misconduct.

568. Upon information and belief, Defendants have intentionally acted or neglected to act knowing that their conduct will probably result in injury or damage to Plaintiffs.

569. Upon information and belief, Defendants are liable for their gross and continuing negligence and their willful misconduct towards Plaintiffs resulting in damage to Plaintiffs.

570. Upon information and belief, Defendants are liable for their gross and continuing negligence and their willful misconduct towards Plaintiffs resulting in Plaintiffs's injuries.

571. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR AN EIGHTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

572. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "571" hereof as if more full and at length set forth herein.

573. Plaintiffs found themselves the object of Defendants' actions whereby Plaintiffs became the subject of

and the object of attack and scrutiny in a New York State Court proceeding wherein Plaintiffs found that they had no available rights or remedies under the laws of the State of New York.

574. Plaintiffs was slandered, defamed and attacked in litigation as a PRETEXTURAL reason for Defendants purported enforcement and others to "punish" Plaintiffs for the attempted exercise their legally available rights with respect to, upon information and belief, political allies and cronies of Defendants.

575. Defendants knowingly caused holds to be placed upon Plaintiffs' personal assets in violation of State law as a part of this enforcement action.

576. Defendant LGpC, acting under color of state law, engaged in a course of conduct intended to deprive Plaintiffs of their constitutionally afforded rights to property while attempting to provoke Plaintiffs in a setting in which Plaintiffs has no rights, enough to create a pretext for their false claims against their and making every attempt to undermine Plaintiffs's credibility the Court.

577. This intent was clearly underscored by the comments of Defendant Auffredou at the April 29, 1998 meeting of Defendant LGpC, setting forth the intent to "go after" Plaintiffs' personal assets and circumvent any protection of corporate existence which might exist.

578. This intent is further underscored by the actions of Defendant LGpC and its representatives in seeking attachment and seizure of Plaintiffs' personal assets in the New York State Court proceeding when Defendant LGpC and their agents were fully aware that Plaintiffs operated their businesses in a corporate form.

579. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their

business reputation as well as personal anger and stress.

AS AND FOR A NINTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

580. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "579" hereof as if more full and at length set forth herein.

581. Plaintiffs found themselves and their assets as the target of attack in the above mentioned Supreme Court enforcement proceedings.

582. Plaintiffs quickly found that, as Defendants White and Gallagher proceeded to change the charges against Plaintiffs at will and without notice to Plaintiffs, they effectively found themselves without the ability to defend themselves and their interests within the existing structure of the purported marina permit review process which had in effect been converted into an enforcement proceeding being run as a Star Chamber proceeding by Defendant LGpC and its personnel.

583. Whenever Plaintiffs attempted to defend themselves within the existing confines of Defendant LGpC's procedures, they found that, since Defendant LGpC "owned the football", it could change the rules of the "game" at will, first alleging that Plaintiffs was in violation for running an alleged "quick launch operation", then another variation and then an alleged "boat launching facility" within the same proceeding, resulting in the denial of Plaintiffs of the basic right to know the charges against their so that they could defend themselves and protect their property rights.

584. The Defendants LGpC and its agents and employees have engaged in "fluid" definition of terms which

renders Plaintiffs' compliance with their requests or compliance impossible.

585. Plaintiffs actively participated in the marina application review process of two (2) other commercial entities, the Dunham's Bay Boat Company and an operation run by Frank J. Parillo.

586. The procedures used in the review of those marina permit applications as well as the definitions applied thereto were markedly different than that applied to Plaintiffs' applications.

587. As a direct result of the foregoing actions by Defendants herein, acting under color of state law, Plaintiffs have been and are denied Equal Protection of the laws and Due Process as guaranteed to Plaintiffs under and by virtue of the Constitution of the United States.

588. Defendants sought individually and in concert, acting under color of state law, to deprive Plaintiffs of their rights and privileges as citizens of the United States pursuant to the First and Fourteenth Amendments to the United States Constitution.

589. All of the above is in direct derogation of State Law, Rules, Regulations and policy and applicable Federal Law.

590. The actions of Defendants complained of have caused Plaintiffs to incur expenses and suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A TENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

591. Plaintiffs repeat and reallege each and every

allegation contained in paragraphs "1" through "590" hereof as if more full and at length set forth herein.

592. Plaintiffs as the primary target of Defendants LGpC and their cohorts, were rebuffed by Defendant DEC in their attempt to protect themselves and their interests, when they sought intervention from the office of Defendant DEC.

593. The permit under which Plaintiffs have continued to operate was a non-revocable permit issued by Defendant DEC in 1982 as recited heretofore.

594. This permit was not statutorily or by regulation revoked since revocation of a DEC operating permit is and was clearly beyond the scope of Defendant LGpC purported authority.

595. Plaintiffs have continuously attempted to work with Defendants LGpC, its agents and employees, to complete an application for a Class A Marina Permit.

596. Defendant LGpC as heretofore recited repeatedly changed the level of the "bar" over which Plaintiffs must leap in order to obtain a Class A Marina Permit.

597. As stated in the previous causes of action, Defendants LGpC have applied both a close scrutiny examination to Plaintiffs unlike that given other applicants and have continuously changed definitions, interpretations of regulations and application of those regulations by administrative fiat rather than lawful and proper changes.

598. Defendant White admitted specifically with reference to the "grandfathering" of prior recreational uses that Defendant LGpC had deviated from the publically published intent of their regulations with respect to "grandfathering".

599. As a direct result of the foregoing actions by

Defendants herein, Plaintiffs were denied Equal Protection of the laws as guaranteed to Plaintiffs under and by virtue of the Constitution of the United States.

600. Defendant LGpC, while informing Plaintiffs through agents and employees that the charges against Plaintiffs could be changed at will by Defendants and without prior notice to Plaintiffs constitutes a denial of the most basic rights accorded to citizens of the Untied States under the Fifth and Fourteenth Amendments to the United States Constitution.

601. Plaintiffs could not even assert basic First Amendment rights, if they were to have chosen to do so when they were not even informed of the ever changing charges pending against them in the shifting sands of bureaucratic prerogative asserted by Defendants herein.

602. Even in the most egregious criminal cases, under the Constitution of the United States such a proceeding without affording the "accused" of his rights would be in total and complete violation of the constitutional rights and guarantees of the "accused".

603. In the above mentioned ongoing proceedings under the guise of the Marina Permit review process Plaintiffs have been "presumed guilty" of all charges leveled against them by Defendants.

604. Plaintiffs were "presumed guilty" of all charges leveled against them by Defendants without benefit of an opportunity of knowing what standards they had to meet in order to obtain the largess of being granted a Class A Marina Permit.

605. Defendants sought to and did, individually and in concert with each other deprive Plaintiffs of their right of redress guaranteed them by the United States Constitution.

606. The actions complained of as above set forth

were done under color of state law and were done deliberately and with forethought to punish and discriminate against Plaintiffs and were done with callous indifference to their Federally protected rights.

607. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A ELEVENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

608. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "607" hereof as if more full and at length set forth herein.

609. The actions, under color of state law, of Defendants were maliciously designed to bring discredit upon the Plaintiffs both before the court and the public, a factor of significant import to Plaintiffs since their reputation was and is of significant import to them and their business.

610. The actions of Defendants in their attempts to discredit Plaintiffs constituted a planned and calculated attempt to maliciously, publicly to slander and libel the Plaintiffs.

611. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

AS AND FOR A TWELFTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

612. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "611" as if fully set forth herein.

613. Plaintiffs under their First Amendment rights of freedom of speech and association and their Fourth Amendment right to a redress of their grievances, often have chosen successfully to challenge numerous governmental officials and entities thorough pro se court challenges.

614. These challenges on several occasions have involved one or more of the named Defendants, their employees and agents.

615. All of the Defendants individually and in concert have purposefully chosen to selectively enforce and to treat Plaintiffs in a discriminatory manner different from other similarly situated citizens in retaliation for Plaintiffs' efforts to exercise their civil rights in violation of Plaintiffs' rights to Due Process guaranteed them by the Fourteenth Amendment to the United States Constitution.

616. As a result of the above, Defendants have cause harm and damage to Plaintiffs.

AS AND FOR A THIRTEENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

617. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "616" as if fully set forth herein.

618. For years, Plaintiffs' property has been used by ambulance, police, and others involved in rescues or emergency situations at the south end of Lake George.

619. The location of Plaintiffs' property and the ease of accessibility to the water for emergency vehicles has been

utilized on numerous occasions to assist in rescue operations.

620. In the past, ambulances have backed down to the water's edge to effectuate transport of individuals requiring emergency medical services.

621. Since the area in question is sandy, in the past vehicles, including emergency medical transport vehicles have experienced difficulties in maneuvering in this area and in making a speedy exit from the water area.

622. For many years since Plaintiffs purchased the property, the North Queensbury Volunteer Fire Co. and the North Queensbury Rescue Squad have utilized our property for drills, practice, as well as in actual emergency situations.

623. Plaintiffs have viewed this usage of their property as something which any property owner having useful facilities as being ready and willing to provide both in emergencies and when requested by such entities serving public needs.

624. In the past, Plaintiffs have had both employees and guests with physical handicaps.

625. During 1999, Plaintiffs have had in their employ one physically handicapped person involved in recreational activities.

626. It is anticipated that Plaintiffs will have handicapped guest in the future.

627. Plaintiffs always have attempted to provide to such handicapped persons the best access they have available to them so that such persons may enjoy Plaintiffs' exercise and recreation facilities and amenities along with those not suffering from such handicaps.

628. Plaintiffs noted handicapped guest who are confined to use of artificial ambulatory devices having

difficulty in maneuvering so as to gain barrier free access to Lake waters.

629. The sandy nature of the soil, without a firmer subsurface, further hampers mobility of such handicapped persons.

630. By letter dated May 7, 1999, Plaintiff John Salvador, Jr. corresponded with Chris Round, hereinafter referred to as "Round", the Executive Director of the Town of Queensbury Community Development Department, advising him of Plaintiffs' intention to construct a Handicap and Emergency Access facility on Plaintiffs' property.

631. In that correspondence, Plaintiff provided Round with a sketch showing the proposed location of the facility and its relationship to the means of ingress and egress.

632. Plaintiffs informed Round that the facility was to be located on parcel identified as tax parcel 4-1-11, located in a WR-1A Zone, and also in one of the Town of Queensbury's Vessel Regulation zones as well as the Lake George Recreation Zone and the Lake George park Recreation Zone..

633. Plaintiff told Round that the facility would be constructed entirely on property owned by Plaintiffs, and would not be constructed on or disturb any Public Lands.

634. Plaintiff stated that the project would not be included in the Adirondack Park Agency's recently established Deep Water Marsh area and that no wet lands would be disturbed or impacted by the project.

635. By letter dated May 12, 1999, Craig Brown, hereinafter referred to as "Brown", the Code Compliance Officer of the Town of Queensbury, responded to my request stating that he had reviewed Plaintiffs' correspondence.

636. Brown stated that he had visited the site on May 11, 1999, and had determined that it involved a hard surfaced access facility, part of which would be within 50 feet of the shoreline of Lake George, requiring Planning Board review through the site Plan Review process.

637. Brown stated that the deadline for June 1999 consideration for inclusion on the Planning Board agenda was May 26, 1999.

638. By letter dated May 24, 1999, Plaintiffs responded to Round and provided for submission in support of Plaintiffs' application, a cross-section sketch of the proposed Handicap and Emergency Access Facility.

639. Plaintiffs requested Round's position on whether some form of Site Plan Review would be required for the project as proposed, and requested that if it were required, that this project be considered for inclusion on the June 1999 Planning Board Agenda.

640. On May 26, 1999, Plaintiffs submitted a Site Plan Application for the proposed Handicap And Emergency Access Facility.

641. By letter dated June 3, 1999, Round notified Plaintiffs that the proposed project had been placed on the Agenda of the Warren County Planning Board for June 9, 1999, and on the Agenda of the Queensbury Planning Board for June 22, 1999. a. On June 9, 1999, the Warren County Planning Board considered the proposed project as presented.

642. Plaintiff John Salvador, Jr. attended that meeting and made a presentation concerning the proposed facility.

643. Plaintiffs further state that they would make the site available for the installation of a dry hydrant.

644. Included in the June 9, 1999, minutes of the

Warren County Planning Board, that body, by Resolution QBY-SPR-25-99.

645. The Warren County Planning Board unanimously adopted a resolution to approve the proposed site plan with the statement that the project would have "a good County impact."

646. The matter of the Handicap and Emergency Access Facility was on the agenda of the Planning Board meeting for June 22, 1999.

647. Plaintiffs attended the meeting of the Planning Board held on June 22, 1999.

648. The agenda for that meeting listed the application of Dunham's Bay Boat & Beach Club as Site Plan No. 25-99 and Type as Unlisted.

649. The Agenda for that meeting listed Plaintiffs as the owners of the real property and listed the Zone in which the property is located as WR-1A, CEA, APA.

650. The agenda incorrectly listed the location as 2999 State Route 9L.

651. The proper location identification should have read "18 Dunham Bay Road"; however, the 2999 State Route 9L address was and is correct for our address, and for the over all address and location of our real property in general.

652. The agenda set forth the purpose of the application as:

> Applicant proposes construction of a Handicap and Emergency Access facility for launching water craft. Hard surfacing within 50 feet of the shoreline requires Planning Board review and approval.

653. At the June 22, 1999, Planning Board meeting,

Plaintiff John Salvador, Jr. presented substantially the same information in support of the application as he had presented to the Warren County Planning Board at its June 9, 1999, meeting.

654. In that presentation, Plaintiff addressed the need for compliance with both the Federal Civil Rights Act of 1964 and the Rehabilitation Act of 1973 as well as the Americans with Disabilities Act of 1990.

655. Plaintiff further discussed the regular usage of their waterfront property by local volunteer units to perform practice for as well as qualification for ice rescue during the winter months, as well as the previously mentioned other seasonal uses for access by guests and members and uses by rescue and fire personnel.

656. Plaintiff noted that the proposed installation of a dry hydrant to facilitate response in the event of an emergency situation requiring quantities of water.

657. As part of the consideration of the proposal at the June 22, 1999, meeting, the Community Development Department of the Town of Queensbury submitted staff notes and recommendation.

658. The Staff note, "the Lake George Park Commission is reviewing the application, no comments have been received."

659. The Recommendation of the Community Development Department was stated as follows:

> Staff would recommend approval of the proposed launch with the condition the use and the construction is in compliance with the Lake George Park Commission and other regulatory agencies.

660. At page 20, et seq. the minutes of the Planning

Board for June 22, 1999, set forth the discussion and consideration of this application.

661. As reflected in those minutes, Plaintiff John Salvador, Jr. responded to questions and clarified certain points concerning the proposal for the Planning Board.

662. Plaintiff stated that the handicap usage would be limited to registered guests and members of the Boat and Beach Club, and not a facility open to the public at large.

663. Plaintiff also corrected a few technical items which had been misstated in the Planning Board Agenda for the record.

664. When the Public Hearing portion of the Planning Board Agenda on this item was opened, a letter was read into the record dated June 18, 1999, addressed to Round.

665. The letter was stated as signed by Mark T. Sweeney, hereinafter referred to as "Sweeney", of the law firm of Shanley, Sweeney, Reilly & Allen, P.C., and stated that they represented Frank J. Parillo, hereinafter referred to as "Parillo", a neighbor.

666. The letter, according to the minutes, stated in pertinent part:

> I am writing on behalf to object to the Salvador's application to construct a Handicapped and Emergency Launch facility for watercraft. . . . such and expanded facility would qualify as a "Boat Launch" under LGPC regulations and would therefore require the Applicant to obtain an amendment to its Permit. It is my understanding that no such application has been made at this time. 2. Specifically, the LGPC has limited the scope of the facilities

> operation of the Applicant as follows: The Applicant is prohibited from operating a Quick Launch . . . . 3. The LGPC's strict limitation of the Applicants' use of their beach area for launching and retrieving vessels by "each registered guest" and "each berthing guest" only during the term of their stay, evidences the LGPC's intent to limit the use of the beach area for launches and is contrary to the application submitted by the Salvadors. . . . 4. Due to the limited usage of the launch allowed by the LGPC, the expanded capability of the improved launch is unnecessary and susceptible of abuse as a non-permitted boat launch. Accordingly, we request that the Salvador's application be denied as contrary to the terms and intent of the Draft LGPC Marina Permit for this facility.

667. Next, a further faxed communication from Sweeney was read into the record.

668. According to the minutes, this communication was faxed on June 22, 1999, and also was addressed to Round.

669. In that communication, as set forth in the minutes, Sweeney, on behalf of Parillo, alleged:

> 1. Construction and operation of a commercial-type boat launch at this location is contrary to the letter and intent of the Waterfront Residential Zones (Queensbury Code § 179-60). a. As the Dunham's Bay Boat and Beach Club is a non-conforming enterprise within the WR-1A zone the Salvadors hereby seek to improperly expand

> a non-conforming use without obtaining a variance per Queensbury Code § 179-79(D). . . . no proper application has been submitted by the Salvadors per Queensbury Code § 179-34 thereby denying the Planning Board, the general public, and adjoining landowners in particular, the ability to analyze the potential significant environmental impacts the commercial-type boat launch would entail. . . . Whether it would follow the intent of the district regulations or the Town's new Comprehensive Land Use Plan; . . . .

670. Continuing, and seeming entirely to miss the point and purpose of the proposal, Sweeney claimed that our proposed Handicap and Emergency Access facility failed to address issues, including "Fire and emergency access".

671. According to the minutes, Sweeney concluded:

> Accordingly, we request that the Salvadors' application be denied as (a) contrary to the express requirements of the WR-1A zone, (b) an illegal expansion of a non-conforming use without a variance or variance modification, (c) lacking other required permits and approvals and (d) as contrary to the objectives and guidelines for regional projects under the Queensbury Code.

672. Following the reading o the two (2) Sweeney communications into the record, Planning Board Chairman MacEwan, asked counsel to the Planning Board Mark Schachner, hereinafter referred to as "Schachner" for his opinion concerning the Parillo-Sweeney statements.

673. Schachner referred to the recommendation of Staff and the need for compliance with Defendant LGpC's requirements; however, with respect to other matters referred to in the Parillo-Sweeney objections, Schachner is quoted in the minutes as stating:

> I did not, as far as the other concerns addressed in that letter relative to the goals and objectives of the Queensbury Zoning Ordinance, I think the Board is familiar with those goals and objectives. I think you can deal with <u>those</u> concerns if you believe they're valid concerns, but my own opinion is that most of that speaks to the issue of State agency jurisdiction, especially the Lake George Park Commission, and that's not really our concern, other than if you want to condition any approval, if that's where you're headed, on compliance with the Lake George Park Commission permit requirements. That's a perfectly appropriate recommendation. [Emphasis supplied]

674. Other members of the Planning followed this comment with statements as follows:

> MR. VOLLARO - The only question I have is that that letter that's written continually
>
> refers to a boat launch. It sounds like that what we're dealing with is not a boat launch. That whole letter couches itself in those terms of boat launch, and that's not what this is, as I understand it.

675. In response, as quoted in the minutes of that

meeting, Plaintiff John Salvador, Jr., stated:

> MR. SALVADOR - With regard to the two letters, I would only comment that there's reference made here to a Lake George Park Commission permit that's pending. We have withdrawn that application. That application does not exist. It has been withdrawn, before the Lake George Park Commission. We are operating our marina under a DEC permit granted to us to do the things we do there. That permit was granted in 1982. It's still valid. No one has told us it's invalid.

676. When asked about certain legal issues with respect to Plaintiffs' permit, Schachner stated:

> I believe the issue that Mr. Salvador has just referred to, which is whether or not continued operation of his commercial, Class A Marina requires Lake George Park commission approval is subject to dispute. . . . If you're heading in this direction, you could certainly take the Staff recommendation, which I believe is for approval conditioned on compliance with the Lake George Park Commission permitting requirements. You could add the phrase "if any", in which case if Mr. Salvador is correct and there is no requirement of the Lake George Park Commission here, then your approval condition would be fulfilled, but I will tell you that I'm quite certain that the Lake George Park Commission believes that there is a Class A Marina operating, that it does require their approval, and that it's a

violation of State law to not have that approval. In other words, the State agency in question, the Lake George Park Commission, does not agree with the Salvadors' contention that they can lawfully continue to operate this Marina under their DEC permit, issued in 1982. Than's my understanding.

677. Plaintiff responded to Schachner, and the dialogue on the record was as follows:

MR. SALVADOR - We are presently operating under a DEC permit, okay. That's what we're doing now. There is a dispute, that is correct.

MR. SCHACHNER - That's what I said.

MR. SALVADOR - But it's not over the fact that we don't need a Class A Marina Permit. It's over the fact that the level of uses they think we are entitled to, that's the dispute.

MR. SCHACHNER - . . . . My point stands, which is there is a dispute between the Salvadors and the Lake George Park Commission, as to whether, and/or what type, of Class a Marina permit they need from that Agency. None of this, in my opinion, has very much to do with the application before us. I would reiterate that the Staff recommendation seems very logical and very rationale and very appropriate, and I think that's one way you can go on this if your like.

678. Thereafter, Plaintiff John Salvador, Jr. responded in detail to the allegations set forth in the Parillo-

Sweeney letters.

679. Plaintiffs stated that neither Sweeney nor Parillo appeared in person at the hearing to respond to questions on issues which they raised.

680. Plaintiffs further stated on the record, as follows:

> This letter before us refers to a launch, and it is not a launch. It could be used for that, for our guests, as our launch facility is used at the present time. We presently launch boats, and I have photographs here I can show you. We presently launch boats. It is classified as an unimproved launch area. That's what it is. This letter talks about, the applicant is prohibited from operating a Quick Launch. We have made no claim that we're operating a Quick Launch, absolutely no claim that we're in the Quick Launch business. The launch at this facility is not open to the general public. Our facility is a commercial operation. There's no way we can deny the public services. That's what we're permitted to do. We give those services to people who register with us, and who pay their fees to be on our premises. That is commercial activity. We have permits to do it. We are licensed to do it, and that's what we do. We operate within those permits. . . . The applicant's ability to launch and retrieve vessels has been specifically limited by the Lake George Park Commission to each registered guest and each berthing customer. We agree. . . . There's talk, in Paragraph 3 about a paved launch. This launch ramp will not be paved. There is no paving in that cross section of

> sketch. . . . No paving. The second letter, construction and operation of a commercial type boat launch at this location. Again, we are a commercial activity. . . . We've been a pre-existing, non-conforming use. We understand that. Every aspect of it. It's a residential zone. . . . There will be no more use than there already is now. There just cannot be anymore use than we already have. It'll just be more convenient. It'll be up to standard for the handicapped people, and believe me, we have these guests. . . .

681. Plaintiff John Salvador, Jr., continued in his response to the allegations made.

682. Thereafter, Resolution No. 25-99 was moved and seconded.

683. Planning Board Resolution 25-99 was then adopted by unanimous vote of the members of the Planning Board, finding,

> . . . the action about to be undertaken by this board will have no significant environmental effect and the Chairman of the Planning Board is hereby authorized to execute and sign and file as may be necessary a statement of non-significance or a negative declaration that may be required by law.

684. Thereafter, Motion to Approve Site Plan No. 25-99 Dunham's Bay Boat & Beach Club was moved and seconded.

685. By unanimous vote the Planning Board adopted the following:

> 1. The Town Planning Board, after

considering the above, hereby moves to approve Site Plan No. 25-99 - Dunham's Bay Boat & Beach Club.

2. The applicant shall present three (3) copies of the above referenced site plan to the Zoning Administrator for his signature.

3. The Zoning Administrator is hereby authorized to sign the resolution.

4. The applicant agrees to the conditions set forth in this resolution.

5. The conditions shall be noted on the map.

6. The issuance of permits is conditioned on compliance and continued compliance with the Zoning Ordinance and site plan approval process.

686. Following a further very brief discussion, the portion of the hearing relevant to the applicant in question ended.

687. By letter dated June 22, 1999, Roger Howard, hereinafter referred to as "Howard", writing on letter head of Dunham's Bay Sea Ray, corresponded with the Planning Board.

688. In that correspondence, Howard set forth three (3) items, overcrowding, pollution and traffic and pedestrian safety as a basis for opposition to the proposed project.

689. Howard specifically stated "I strongly object to the project . . . " [Emphasis supplied].

690. By letter dated June 22, 1999, from Defendant LGpC, addressed to Plaintiffs, Plaintiffs were informed as follows:

> Please be advised that the referenced project involves the construction of a boat launch and requires a permit from the Commission pursuant to 6NYCRR 646-1.2(a)(1) prior to construction since the project alters and expands the launch facilities of Dunham's Bay Lodge and expands the number or type of services or recreational activities offered.
>
> It appears that the project also requires a permit pursuant to Article 15 of the Environmental Conservation Law, 6NYCRR 608 for the placement of fill below the mean high water level of Lake George. You should obtain a determination and, if required, a permit pursuant to Article 15 ECL from NYS Department of Environmental Conservation before commencing construction.

691. By letter dated June 23, 1999, from Round, Plaintiffs were officially informed of the favorable determination and vote of the Planning Board at its June 22, 1999, meeting on our proposed project.

692. On June 26, 1999, Plaintiffs responded to Round's letter and requests and to provided to him a further cross-section sketch of the facility.

693. Also on June 26, 1999, Plaintiffs wrote to Craig MacEwan, hereinafter referred to as "MacEwan", the

Chairman of the Planning Board concerning the approval of Resolution Site Plan No. 25-99 for the proposed project.

694. In that correspondence Plaintiff raised concerns about the language contained in the Resolution as adopted by the Planning Board.

695. Specifically, Plaintiffs pointed out:

> It never was our intention to undertake work of an up-to-standard handicap and emergency access facility in a manner which would confine its future use to that of "launching of water craft". . . . You will note from this registration that more than just watercraft have utilized our present launch area. . . . Unless we can obtain some kind of waiver, this proposed facility must be designed to handle on a year-round basis, the exercise and recreation activities of the handicapped as well as those involved in emergency services.
>
> Finally, does the motion as written allow for emergency vehicle use and access unless the emergency vehicle is a "watercraft"?
>
> . . . .
>
> It is essential that this "launching of watercraft" limitation be clarified in order for us to determine which regulatory agencies might be jurisdictional.

696. By letter dated June 29, 1999, Plaintiff John Salvador, Jr. wrote to Defendant White, responding to White's prior correspondence concerning the project. On or about June 29, 1999, in response to Plaintiffs' request,

Plaintiffs received a copy of a Design Packet from the Independent Living Center.

697. At the July 20, 1999, meeting of the Planning Board, the Planning Board, a motion was made and seconded to approve a modification of Site Plan 25-99 for Dunhams [sic.] Bay Boat and Beach Club.

698. The motion was adopted by vote of five (5) in favor, none opposed, and one (1) abstention.

699. By that motion, the Planning Board specified as follows:

> In accordance with the way the modification is made, for lake access is still correct. The Planning Board has determined, also, that there is no significant change in the site plan modification and further finds that there is no sufficient change to the original SEQRA findings. We're revising the original motion to delete the phrase that dimension drawings should be submitted prior to issuance of a building permit, and also we're taking out the phrase "For launching of water craft", and replacing that "For lake access", as per 7/20/99 revised resolution.

700. By letter dated July 24, 1999, Plaintiffs wrote to Richard Wild, hereinafter referred to as "Wild", in his capacity as Regional Permit Administrator, Region 5, NYS Department of Environmental Conservation.

701. In that correspondence, Plaintiff referred to the items set forth in the Resolution of the Planning Board with respect to the project:

> One of the stipulations introduced by Counsel to the Queensbury Town Planning Board and made a part of the approval

resolution is that "the use and the construction is in compliance with the Lake George park Commission and other regulatory agencies." We assume that Counsel has referred to compliance with the Governor's February 1998 program for "Wetland and Waterfront Development Permits".

702. In that correspondence, Plaintiffs referred to the steps which had already been taken by them with respect to the project and determination of necessary approvals.

703. Plaintiffs specified as follows:

> Concerning this project, we made contact with Al Bauder, Submerged Lands Manager with the State Bureau of Land Management at the Office of General Services. We were able to point out to Mr. Bauder that because this facility when finished will not occupy nor disturb any Public Lands; a land easement from the O.G.S. should not be required. He concurred and further suggested that the D.E.C. might better serve as the coordinating agency for the facility described herein. To this end, we are forwarding a complete set of "Joint Application for Permit" taken from the governor's program packet. We would like your confirmation that we will be in conformance with at least the Queensbury Planning Board's Resolution as it requires us to obtain all use and construction permits required from the un-named regulatory agencies.

704. Plaintiffs provided additional information

therewith to assist in determination of the jurisdictional interest and limits.

705. By letter dated August 2, 1999, Plaintiff John Salvador, Jr. corresponded with Defendant White of the LGpC.

706. Plaintiffs explained therein their need to comply with the Americans with Disabilities Act provisions with respect to barrier-free accommodations and access for the purposes of exercise and recreation for physically and/or mentally handicapped patrons.

707. Plaintiffs also explained the need to provide such accommodations for physically and/or mentally handicapped individuals who might be employed at their facilities.

708. The emergency access portion of the project was explained as follows:

> The emergency access feature of this project should be considered more of a community service undertaking rather than something which might be considered beneficial only to our property and our guests. Without increasing the costs measurably, we can incorporate the means which will allow these facilities to be used by our local emergency services organizations which supply emergency medical and fire protection to the recreation community both on and off the Lake.

709. Rather than expanding any facilities, this project would, in fact, reduce the facilities available at their location, specifically, the removal of approximately 12 feet of the 36 foot section of the "L" shaped duly permitted and authorized dock on Plaintiffs' property.

710. None of the project work would encroach on the Public Lands.

711. All work would be performed up-land of the Mean High-water Level of 320.2 MSL for Lake George.

712. In that correspondence, Plaintiffs explained in detail for the benefit of Defendant LGpC as follows:

> As there is concern that the improvements we are fostering in order to facilitate handicap access for watersports, exercise and recreation may constitute an expansion of our existing operations, we would like to state that, as is with all of our insitu facilities, they are intended for use only by registered lodging guests of Dunham's Bay Lodge and the dues paying members of the Dunham's Bay Boat & Beach Club. The only way an increase in the use of this facility could occur is if we began to draw a greater number of physically and/or mentally handicapped Americans seeking our accommodations for their exercise and/or recreation. Even if this be the case, then only those accommodations which presently represent an under utilization of our allowed usage level could be occupied by such physically and/or mentally handicapped persons. As for facilitating the work-place for physically and/or mentally handicapped persons, we are seeing the need to do everything possible to enhance the desirability of our recreation facility as a place where we can be productively and gainfully employed regardless of a person's handicap.

713. Plaintiffs requested that Defendant LGpC advise whether or not a permit from that agency would be required for project.

714. On or about August 5 or 6, 1999, Plaintiff John Salvador, Jr. spoke with David Wick, concerning our proposed installation of a dry hydrant which Plaintiffs believed would be of assistance to the local fire fighters.

715. By notice dated August 10, 1999, Plaintiffs were advised by Joseph C. Prall, hereinafter referred to as "Prall", of the New York State Department of Environmental Conservation, Division of Environmental Permits, Region 5, Warrensburg Sub-Office, that Plaintiffs' application identified as Application ID #5-5234-00414/00001 for permit relating to Article 15, Title 5: Excavation & Fill in Navigable Waters, and permit relating to § 401 Clean Water Act: Water Quality Certification required additional information.

716. The additional information requested was specified as follows:

> The submission lacked sufficient information to determine jurisdiction. Please advise what excavation or placement of fill below the mean high water mark is proposed. Please show on the enclosed map where the project is and the demensions [sic.].

717. By letter dated August 12, 1999, with attachments, Plaintiffs responded to Prall's request.

718. Plaintiffs first corrected both the applicant name and the facility name as well as the project description on the cover sheet the Prall notification has indicated needed to be attached to the resubmission.

719. As requested by Prall, Plaintiffs indicated on the "location Sketch" by shading the area where the proposed facility was to be located on our waterfront

property.

720. Plaintiffs stated that the small amount of anticipated gravel fill which would be used in the project would be located above the Mean High water level of Lake George.

721. All of the work would take place on Plaintiffs' lands which were submerged under the flood waters of Lake George, not on Public Lands.

722. By letter dated August 12, 1999, from Defendant Gallagher, responding to Plaintiffs' letter of August 2, 1999, referred Plaintiffs to Defendant White's letter of June 22, 1999, with no further explanation.

723. When Plaintiffs initiated this project, they did not anticipated any opposition to improvement of handicap access or provision of better emergency access for community emergency service providers.

724. The last thing which Plaintiffs anticipated was opposition to their compliance with federally mandated requirements for handicap access by governmental entities.

725. Plaintiffs did not anticipate an outcry from their neighbors opposing this project, attempting to veil exclusion of physically and/or mentally handicapped persons from being able to enjoy the use of Lake George.

726. In August 1999, we were served with a Petition-Complaint seeking to prohibit Plaintiffs herein from obtaining building permits, approvals and/or variance for this project based upon the allegations that compliance with Federal Statute (including but not limited to the Americans with Disabilities Act, is in violation of the New York State Town Law, the New York State Environmental Conservation Law, and the Zoning Ordinance of the Town of Queensbury.

727. The issue of whether or not the handicap and

emergency access ramp constituted an expansion of the existing operations has been fully litigated in New York State Supreme Court Warren County in the case of In the Matter of the Application of: Dunham's Bay Boat Co., Inc. and Frank J. Parillo v. The Town of Queensbury Planning Board, The Town of Queensbury, Craig Brown as Code Compliance Officer for the Town of Queensbury, Dunham's Bay Beach and Boat Club, John Salvador, Jr. and Kathleen A. Salvador, bearing Index Number 38303 and RJI number 56-1-99-0474.

728. In a decision handed down by Judge Viscardi, the Court considered the upgrade the area in question, the primary purpose of which is to provide barrier-free access to the Lake for use by their patrons as well as by the personnel of local fire and emergency medical services.

729. The court reviewed the application which included documentation that Plaintiffs' bathing beach, which has long been in existence and use, is classified as an "unimproved" accessway and lacks many characteristics now considered minimal for handicap access rating.

730. As set forth in the pleadings and supporting documentation before Judge Viscardi, Plaintiffs are not only responding to this requirement of the Americans With Disabilities Act as it may affect their patrons, but also are acknowledging their obligation to any of their handicapped employees and to the North Queensbury public service providers who Plaintiffs have allowed to use their unimproved launch facility to perform lake use related rescues as well as provide a means to obtain water for fire fighting.

731. As set forth in that case, Plaintiffs' current unimproved launch is a permitted pre-existing, prior non-conforming uses and, therefore, was and is within the sphere of protection of the law.

732. On or about December 7, 1999, Plaintiffs received a communication from Defendant White writing on behalf of Defendant LGPC concerning the position of Defendant LGpC with respect to the handicap and emergency access facility which has been approved by the Town of Queensbury.

733. In that correspondence, Defendant White states:

> Based upon this record, the **project constitutes construction and operation of a boat launch which the Commission has determined is and expansion of marina activities. Accordingly, construction or operation of the facility will first require a permit from the Commission.**

734. Defendant White continued:

> However, as set forth in our complaint in the matter of the Lake George Park Commission v. John and Kathleen Salvador, you are required to obtain a permit from the Commission pursuant to 6NYCRR 646-1.2 for the operation of your marina along Dunham's Bay.

735. In that litigation, both Plaintiffs and the Town of Queensbury responded and defended the action of the Planning Board in approving the project.

736. As co-defendants, Plaintiffs and the Town prevailed.

737. In the decision handed down by New York State Supreme Court Justice Dominick J. Viscardi, the project was found to be an acceptable use of the non-conforming property.

738. Judge Viscardi found, with great specificity, that the Planning Board's decision approving Plaintiffs' application was neither arbitrary nor capricious nor contrary to law.

739. The Court also held that the provision of such handicap and emergency access at Plaintiffs' facilities ". . . **will not result in any increase in use or change of use than what is already permitted**."

740. In view of this holding as well as the facts, Defendant White and Defendant LGpC are legally wrong in their determination and allegation that ". . . the project constitutes . . . an expansion of marina activities." and that the Commission ". . . will first require a permit from the Commission."

741. The decision of Judge Viscardi is directly in point and constitutes res judicata and collateral estoppel with respect thereto.

742. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

743. All of Plaintiffs' losses are continuing.

AS AND FOR A FOURTEENTH CAUSE OF ACTION, PLAINTIFFS ALLEGE

746. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "745" as if fully set forth herein.

747. It has been and continues to be Plaintiffs' position that they are continuing to lawfully operate under their original DEC marina permit.

748. The Defendant LGpC has taken the position the that Plaintiffs' DEC permit is no longer valid despite having no statutory authority for either the revocation or termination of those permits previously issued by the DEC.

749. As evidence of the Defendants' selective enforcement, inconsistent interpretation and purposeful attempts to deny Plaintiffs their constitutional rights to due process and equal protection of the law, Plaintiffs recently received, as part of their continuing efforts to resolve the new dispute concerning the handicapped access, a marina permit application form with a date of April 1998, as its issuance date, with the category on its face "Renewal of DEC Permit".

750. The Plaintiffs were later informed that this form had been sent in error, with a new form without that category attached to that letter.

751. At no time during the pendency of their application before the LGPC did the Plaintiffs ver receive an application form with that category available to them.

752. The sum and substance of this Complaint is Defendants' purposeful, selective administrative, inconsistent standards, and clearly discriminatory treatment toward the Plaintiffs by the Defendants and their employees.

753. The actions of Defendants complained of have caused Plaintiffs to incur expenses and to suffer loss of business and potential future business and damage to their business reputation as well as personal anger and stress.

754. All of Plaintiffs' losses are continuing.

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment for the Plaintiffs, as follows:

1. Against each Defendant in their official capacities the sum of $1,000,000.00 each and in their personal capacity $2,000,000.00 each and; further

2. Ordering Defendants to compensate Plaintiffs for direct and compensatory damages in the amount of $10,000,000.00; and further

3. Ordering Defendants to pay and reimburse Plaintiffs for Court costs and expenditures and legal counsel fees.

4. Ordering Defendants to pay punitive damages for the purposeful and intentional violations of Plaintiffs's constitutional rights in amounts to be determined by this Court.

5. Granting Plaintiffs such further and other relief as the Court may deem just and proper.

DATED: Delmar, New York
December 30, 1999

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01-7539

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN SALVADOR, JR., and KATHLEEN A. SALVADOR,

Plaintiffs-Appellants,

- against -

THE LAKE GEORGE PARK COMMISSION, *et al.*,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF RESPONDING TO BRIEF OF APPELLEE AUFFREDOU

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POINT I

APPELLANTS INCORPORATE BY REFERENCE HEREIN ALL POINTS AND INFORMATION SUBMITTED IN REPLY TO STATE'S RESPONSE TO APPELLANTS BRIEF INCLUDING THE FOLLOWING POINTS: I. APPELLANTS FAIL ALL ASPECTS OF THE TEST ESTABLISHED BY THIS COURT IN *McGINTY* v. *NEW YORK*, AND CANNOT BE AFFORDED ELEVENTH AMENDMENT IMMUNITY

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POINT II

PLAINTIFFS HAVE PLEAD ALLEGATIONS SUFFICIENT TO PRESENT A "CASE OR CONTROVERSY" REVIEWABLE BY FEDERAL COURTS

The Salvadors plead allegations sufficient to present a "case or controversy" properly rev-iewable by Federal Courts. John Salvador, Jr. and Kathleen A. Salvador, Plaintiffs-Appellants[7] have fully set forth the basis for Federal jurisdiction in the instant case in the pleadings already before this Court. In response, Auffredou and the

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Hereinafter John Salvador, Jr. and Kathleen A. Salvador, Plaintiffs-Appellants, are referred to either as "Salvadors" or "Appellants" and all Defendants-Appellees with the exception of Defendant-Appellee Martin Auffre-dou, are referred to collectively as "State" or "State Appellees". Defendant-Appellee Lake George park Commission hereinafter "Commission" and Defendant-Appellee Auffredou referred to as "Auffredou" or "Appellee Auffredou".

State ignore the violations of Salvadors' Constitutional rights which were the direct cause of the withdrawal of Salvadors' application to the Com-mission. This is akin to the situation encountered by plaintiff in *Palazzolo* v. *Rhode Island,* 121 S. Ct. 2448, Docket No. 99-2047, decided June 28, 2001, cited in Salvadors' Brief before this Court, but far exceeding the gravity and significance with respect to individual property rights in that recent case. At the least, Salvadors are entitled to discovery prior to any decision with respect to Auffre-dou's and the State's Motions. The vast majority of the documentation, records and evidence relat-ing to the matters at issue in the underlying action are solely and exclusively within the hands of the State. Access to this information, in particular discovery in the form of deposition, has been denied to Salvadors. Appellees raised issues relating to State Court litigation. Salvadors point out to this Court that they have no adequate State Court remedies in the State Court Enforcement action brought by the Commission on the TRO issue or on the continuing pending issue of request for judicial subpoenas in the State Court case for obtaining testimony and documents in the State Court case to defend on a hearing on the issue of permanent injunctive relief sought therein by the Com-mission. A proceeding under Civil Practice Law and Rules, ("CPLR"), Article 78 in the nature of mandamus or in the nature of prohibition is not appropriate. Prohibition does not lie since the State Court already granted the TRO and prohibition on that point is moot. Mandamus is not appropriate since the two issues before that Court for which it could be considered do not constitute either a duty which was not performed nor was it an anticipated act which it can be enjoined from performing. The State Court TRO issues are inextricably intertwined with the proof of the violation and continuing violation of Salvadors' Constitutional rights as well as the continuing denial of due process and equal protection by Appellees. Judicial Subpoenas are required

for the identified wit-nesses since they are State employees and the in-formation sought is "State information" and records. If Salvadors do not obtain the Judicial Subpoenas sought, the will be placed at a substantial disadvantage in defending a hearing on the TRO. There is no statutory time limit within which a State Court Judge must make a decision concerning the issuance or non-issuance of a Judicial Subpoena; therefore, the delay of over a year and one-half is excessive, there appears to be no legal basis upon which Salvadors can move to compel a State Court Judge to act in such instances, nor do they have any statutory basis for seeking the State Court Judge to hold a hearing with respect to the issuance of the Judicial Subpoenas requested. Salvadors are not in a position move before State Court to compel that Court to proceed to hearing on the TRO, since, without the testimony and evidence sought, Salvadors would go to hearing with the State hiding its witnesses and shielding its public documents and having no method of compelling their production. Despite document acquisition via FOIL, numerous documents are unavailable through that method, and no witness testimony can be obtained through FOIL. Salvadors must rely upon the Trial Court to direct by way of Judicial Subpoena, the production of witnesses and evidence solely in the hands of, or under the dominion and control of State. The remand of the State Court case brought by the Commission places Salvadors in a conundrum from which there is no exit.

Were Salvadors receiving the due process and equal protection to which they are entitled in the State Court action, they might have obtained at least a portion of the discovery material required in the instant action pending before this Court. They have no collateral source for obtaining that essential material; Auffredou and the State should not be allowed to rely upon such lack of information, as a basis for confirming the denial of such

Constitutional rights to Salvadors. The same is true with respect to the claims of immunity asserted by Appellees in response to Savladors' motion. As-suming Salvadors' pleadings are construed in the light most favorable to them, then the allegations set forth therein in that respect must be determined to establish an adequate basis to find Auffredou and individual State-Appellees, acting as "agents of the State", were knowingly engaged in *ultra vires* activities which are neither legal acts nor entitled to the protection of any claim of immunity.

How Auffredou and State can assert, with even an iota of sincerity, much less in good faith, that there is no factual predicate upon which Salvadors base their assertion under the ADA is incredible on its face. Whether or not individual Appellees named as Defendants in the instant action are or are not "persons" under ADA the ADA is irrelevant to Salvadors' allegations. The action stands under the correct legal interpretation of the ADA with respect to the facts of this case. As is fully briefed in Appellants' Brief, the lower Court's reading of *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 351 (2001), to extend the scope of the Supreme Court's interpretation of ADA therein to encompass this case which is not an action involving ADA in which the underlying premise is founded upon employment issues between the State and its employees, constitutes a distortion of the legal principles enunciated by the Supreme Court which cannot be arrived at without destruction of the inherent principles set forth by the Court in that case. Further, the claims enun-ciated in Salvadors' Complaint are specifically framed and clearly fall within the scope of liability wherein sovereign immunity is not applicable to protect State actions. As established under English common law and continuing to date, the fact that the sovereign, here the State, does not itself act, but is deemed to act through its designated servants, here State

employees, is an essential element in determination of how an action is to be pled and proved as against a State defendant. Acts of Auffredou and the agents-employees of State are what makes the State liable. It is untrue that "the Sovereign can do no wrong". It can and it does. That is precisely why statutes such as the ADA allow for actions against the State under circumstances in which, as here, sovereign immunity is not a valid or viable defense. The sovereign does not act itself, the State as here, acts through its employees. If the State is to assert any viable defense, then that defense would be that the actors, its employees exceeded, the authority vested in them by the sovereign State, and their acts, therefore, were *ultra vires*, under any interpretation, naming of the actors is essential since they are and must be necessary parties to any such action founded upon allegations of individual acts which by attribution are the acts of the sovereign State. This is particularly true with respect to attribution of intent, motivation and malice which cannot otherwise to be found in an inanimate non-human entity such as the "State". The allegations of alleged failure to establish discriminatory animus or ill-will asserted by State clearly is an issue requiring that Salvadors have an opportunity for discovery prior to any dismissal of this action. From an alternative prospective, the State can be viewed as an animate, living entity, when properly identified as a "person" in the truest sense of that word, that is the entire *persona* of the governed which "masses" are in fact the State. The fact that the State in its consistent treatment of Salvadors extends to them "special" treatment, different both in type and kind from that accorded the other members of the "unwashed masses" making up the State, is clear from the allegations detailed in Salvadors' papers. By point of information, "special" treatment is not always "better" treatment as is clearly established by the manner in which Auffredou and State consistently dealt with Salvadors. As a matter of public

record, of which this Court may take judicial notice, Salvadors have been involved in other prior litigation in which the Commission was a party. The consistent references to and the tenor of those references by State to other litigation establishes the underlying animus influencing, coloring and distorting Appellees', in particularly the Commission's view of Salvadors and anything they do. When the State addresses attribution of improper motivation with respect to Salvadors "disabled customers", they totally ignore the fact that Salvadors have in the past, and realistically anticipate to have in the future, handicapped employees. Apparently, Auffredou and the State view any handicapped employees hired by Salvadors as "guilty by association" with Salvadors and unworthy of having the benefits of the ADA accorded to them. Even criminals are entitled to a higher level of due process and equal protection under the laws than Appellees have grudgingly afforded Salvadors in Appellees' dealings with their nemesis Salvadors.

Salvadors also effectively have been denied their Constitutional rights of access to Federal Courts through the back-door implications of State Court controlling issues alleged by State and accepted below. Using smoke and mirrors, the State has distracted the Courts from consideration of the grave underlying issues of continual and consistent desperate treatment of Salvadors in their dealing with Auffredou, the Commission and other State entities involved. This is not a figment of Salvadors' imagination; it is not paranoia. It is fact, Salvadors, where ever possible have provided the Courts with documentary evidence of desperate treatment. By way of example, the statements made by Auffredou on the public record concerning the handling of Salvadors' application in a manner diametrically opposed to the manner in which the Commission had just handled another similar application,

provides only one detail supporting Salvadors' allegations. Salvadors are justified in believing that, were they granted discovery in this action, they would unearth numerous additional examples of such targeting, intensive and excessive scrutiny as compared to other applicants, and generally illegal and improper treatment of Salvadirs in their dealings with Appellees. If this Court determines that Salvadors have not already submitted more than adequate proof to defeat Auffredou's and State's motions, then Salvadors have documented more than sufficiently the basis for their request that discovery proceed here, necessitating denial both of Appellees' motions.

POINT III

AUFFREDOU IGNORES THE FACTS UNDERLYING THE INSTANT ACTION IN THEIR ALLEGATION THAT THERE IS NO CASE OR CONTROVERSY

The "case or controversy" issue has been considered with respect to Auffredou's allegations relative to jurisdictional issues above; Auffredou and State further distort the facts in this case. In Point 1of Auffredou's argument and also in State's, Appellees assert that Salvadors have not jumped through each and every administrative hoop, real and imagined to be required to proceed before Federal Court for adjudication of their claims. As the court found in *Palazzolo* v. *Rhode Island,* 121 S.Ct. 2448, Docket No. 99-2047, decided June 28, 2001, *supra,* such requirement applied in cases in which the procedures are overly burdensome to litigants are unnecessary and not required before a party can seek judicial relief. It is ludicrous for Salvadors to proceed further in pursuit of an administrative remedy. Not only has the result been "telegraphed" to them by statements of individual Appellees, they have been

informed by Auffredou and State's counsel repeatedly, that they shall be treated "differently" from others proceeding before the Commission, but that their past "sins" of challenging the Commission in court is to be revisited each time Salvadors seek any permit or otherwise seek any relief. Auffredou's demand, on behalf of the Commission that it be Salvadors personally and not the corporation operating the marina which was required to make application, stating in words or substance that he was requiring such application, not required of other applicants, so Salvadors' personal assets could be reached by the Commission, is discriminatory on its face, and establishing if not planned and intended total rejection by Auffredou of any application or relief sought by Salvadors, at least establishing his and State's clear intent to treat Salvadors and any application made by them in a discriminatory fashion violative of their Constitutional rights. If allowed, Auffredou and State will continue to force Salvadors to jump through administrative hoops, putting up new and additional obstacles for an indeterminate period of time. Auffredou may claim a lack of ripeness purportedly based upon incomplete status of any application, this not only specious, it should be found to constitute an attempted fraud on this Court. Auffredou and State know full well the history leading to this litigation. Auffredou's and State's unsuccessful race to the courthouse to file a State Court enforcement action against Salvadors, their clearly intentional acts of interference with the completion and use of the handicapped access and their blockage by whatever means of Salvadors' right to a hearing on the State TRO and Judicial Subpoenas, establishes facts which neither Auffredou nor Commission has disputed. They stand as a matter of record. The Salvadors properly rely on *Palazzo* with respect to administrative remedy exhaustion. The Supreme Court reviewing a decision relating to alleged violation of the Takings Clause of the Fifth Amendment as applied to the States through the Due

Process Clause of the Fourteenth Amendment, the Court reviewed issues requiring weighing of public purpose and private interests, including private property rights. The issue underlying this action rests upon the State's "taking" of Salvadors' "property right" in their pre-existing, non-revocable Permit to Operate a Marina. In *Palazzolo,* a property owner applied on at least two separate occasions for relief from regulations dealing with the public purpose of protection of coastal wetlands. One matter at issue was failure of the private property owner to pursue all possible administrative alternatives for relief repeatedly before resort to courts. The Court held under existing statutes and regulations it was highly unlikely the private property owner would succeed in pursuit of administrative remedies no matter how often applied for:

> The application fared no better with the Council than previous ones. Under the agency's regulations, a landowner wishing to fill salt marsh on Winnapaug Pond needed a "special exception" from the Council.. . . . [T]he Council said the beach club proposal con-flicted with the regulatory standard for a special exception. . . . To secure a special exception the proposed activity must serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." . . . . *Id.,* at 2456.

The same type of regulatory machinations existed to thwart the Rhode Island property owner as have been concocted for the operations of Auffredou and State. The impossibility of compliance with the regulatory hurdles artificially created by State for the grant of a permit, and the disparate methodology used by Appellees with Salvadors are so

narrow and preclusive they create a never ending bureaucratic circle of fire resulting in a regulatory environment in which regardless of, if or how many times the Salvadors applied for this relief, it would be denied by Appellees.

In *Palazzolo,* after failing to obtain any administrative relief, petitioner proceeded to court:

> Petitioner filed an inverse condemnation action in Rhode Island Superior Court, assert-ing that the State's wet land regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. See App. 45. The suit alleged the Council's action deprived him of "all economically beneficially use" of his property, *ibid.,* resulting in a total taking requiring compensation under *Lucas* v. *South Carolina Costal Council,* 505 U.S. 1003 (1992). *Id.,* at 2456.

Failing in state courts, petitioner sought review by the Supreme Court which, while finding that petitioner as owner of the property had not been denied *all* economic use of his property, was entitled to relief founded upon his other Constitutional arguments holding:

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226(1897), prohibits the government from taking private property for public use without just compensation. . . [e]ven a minimal "permanent physical occupation of real property" requires

compensation under the Clause. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). In *Pennsylvania Coal Co.* v *Mahon*, 260 U.S. 393(1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' . . . formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."*Id.*,at 415. *Palazzolo, supra,* at 2457.

Continuing review of the basis used for Constitutional taking, the Supreme Court stated:

Since *Mahon*, we have given some, but not too specific guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualification, see *infra* at 19-21, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas,* 505 U.S, at 1015[*Lucas* v *South Carolina Costal Council,* 505 U.S. 1003 (1992)]; see also id., at 1035 (Kennedy, J., concurring) *Agins* v.*City of Tiburon,* 447 U.S. 255, 261 (1980). There a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including th regulation's economic effect on the land-owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government

> action. *Penn Central, supra,* at124 [*Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978)]. These inquiries are in-formed by the purpose of the Takings Clause, which is to prevent the government from "forcing people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."*Armstrong* v *United States,* 364 US. 40, 49(1960).*Palazzolo,* at 2457-8.

The Court addressed two key questions, the first, ripeness of the controversy for judicial review, and the second, the claim of takings with respect to after acquired (post-statutory enactment) property. The issue or ripeness has been a consistent hurdle placed in Salvadors' path by Auffredou and State. The Supreme Court in *Palazzolo* enunciated the following:

> In *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), the Court explained that requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charge with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue." *Id.,* at 186. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, see *Lucas, supra,* at 1015, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see *Penn Central, supra,* at 124. These matters cannot be

resolved in definitive terms until a court knows "the extent of permitted development on the land in question. *MacDonald, Sommers & Frates* v. *Yolo County*, 477 U.S. 340, 531 (1986). . . . [t]he Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim.

. . . . The Court reasoned that, notwithstanding the Council's denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner's parcel. We cannot agree.

The Court based its holding in part upon petitioner's failure to explore "any other use for the property that would involve filling substantially less wet lands.". . . . [W]hile the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill . . . 5 acres would have been approved. . . . [and] we cannot know for sure the extent of permitted development on petitioner's wetlands.

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. . . . The Council is permitted to allow the exception, however, only where a "compelling public purpose" is served. *Id.*, §130A(2). . . . There is no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public

purpose." App. 27; cf. *id.*, at 17 . . . .

Williamson County's final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. . . .

. . . Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. . . . . .Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999).

With respect to the wetlands on petitioner's

> property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands. The rulings of the Council . . .interpreting the regulations at issue, the briefs, arguments ***and candid statements by counsel*** for both sides, leave no doubt on this point: . . . there can be no fill for any ordinary land use. . . .[n]o fill for its own sake; no fill for a beach club, . . . no fill for a subdivision; no fill for any likely foreseeable use. And . . . no structures and no development on the wetlands. Further permit applications were not necessary to establish this point. [Emphasis added] *Palazzolo, supra,* at .

In reaching its determination on the ripeness issue, the Supreme Court held:

> Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use. *Palazzolo, supra,* at 2460.

In concluding consideration of ripeness in *Palazzolo,* the Supreme Court found:

> In concluding that *Williamson County*'s final decision requirement was not satisfied the State Supreme court placed emphasis on petitioner's failure to "appl[y] for permission to develop [the] seventy-four-lot subdivision" that was the basis for the damages sought in his inverse condemnation suit. . .

. The Council's practice,. . . is to consider a proposal only if the applicant has satisfied all other regulatory preconditions for the use envisioned in the application. The subdivision proposal that was the basis for petitioner's takings claim, they add, could not have proceeded before the Council without, at a minimum, zoning approval from the town of Westerly an a permit from the Rhode Island Department of Environmental Management allowing the installation of individual sewage disposal systems on the property. . . .

. . . . Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required under our ripeness decisions. . . . When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, see *Olson* v. *United States,* 292 U.S. 246, 255 (1934); 4 J. Sackman, *Nichols on Eminent Domain* §12.01 (rev. 3d ed. 2000) - an inquiry which will turn, in part on restrictions on use imposed by legitimate zoning or other regulatory limitations, see *id.,* at §12C.03[1].

. . . . Where the state agency charged with enforcing a challenged land use regulation entertains an application from and owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable

> state law exhaustion or pre-permit processes, see *Felder* v. *Casey,* 487 U.S. 131, 150-151 (1988), federal ripeness rules do not require the submission of further futile applications with other agencies. *Palazzolo, supra,* at 2461-2.

The Court succinctly stated the interpretation of the Takings Clause of the Fifth Amendment which realistically and adequately addresses the rights of those impacted by unfettered state action.

> The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. *Palazzolo, supra,* at 2463.
>
> . . . . . .
>
> He asserts, none the less, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value." Brief for Petitioner 37. *Palazzolo, supra,* at 2464.

The Salvadors cannot even determine from the prior actions of State and Commission, what if any "crumb" State in its magnanimity might deign to tossed to them..

Auffredou and State's arguments that there is no "case or controversy" must fail.

POINT IV

APPELLANTS HAVE ALLEGED RELIEF ADEQUATE TO ESTABLISH CAUSES OF ACTION ENTITLING THEM TO RELIEF UNDER THE ADA AND FOR VIOLATIONS OF APPELLANTS CIVIL RIGHTS

The Supreme Court has held that governmental statutory action can result in destruction of "previously existing rights of property and contract." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413 (1922). The Court succinctly stated the applicable principle:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . .[O]bviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. *Id.,* 413.

Under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), when state officials act in a manner which violates federal constitutional rights, those improper acts are considered not to be actions of the state, and injunctive or declaratory relief is available to plaintiffs in federal court and is not barred by the Eleventh Amendment. *HBP Associates* v. *Marsh,* 893 F.Supp. 271, 277 (S.D.N.Y 1995). Auffredou and State assert that the operation of the Eleventh Amendment provides them with the cloak of immunity;

they are in error. The Eleventh Amendment is not a bar to actions seeking *prospective* relief from the state treasury, only a bar to compensation from the state and its agencies for *retrospective* relief. *Ex Parte Young*, 209 U.S. 123 (1908); *Edelman* v. *Jordan*, 415 U.S. 651, 667-68 (1974) (prospective relief is permissible even though it produces an "ancillary effect" on the state treasury). This Court can issue not only prospective relief such as an injunction requiring conformity of future conduct to federal law, but can also rule that the Commission, as an agency of the State for the purposes of discriminatory actions under the color of State law, must pay for the prospective relief of bringing about the effective "taking" of Salvadors' property, denial of equal protection and due process, all being the proximate cause of the damage to Salvadors.

The Complaint in addition to naming the Commission, names Auffredou and other individual defendants pursuant to *Santiago* v. *New York State Department of Correctional Services*, 945 F. 2d 25 (2d Cir. 1991), *cert denied*, 112 S.Ct. 1168 (1992) establishing that the Eleventh Amendment does not apply when a plaintiff seeks damages (retrospective or prospective) against a public official in his or her personal capacity. *Scheuer* v. *Rhodes*, 416 U.S. 232, 237-38(1974); *Dube* v. *State University*, 900 F.2d 587, 595 (2d Cir. 1990). Salvadors' Complaint seeks both; it seeks relief from the named State parties and Auffredou in both their personal and official capacities, rendering Appellees' argument erroneous. Auffredou and State argue that no discriminatory animus has been alleged by Salvadors with respect an identified group. That conclusion is unfounded and erroneous. *Thornton* v. *City of Albany*, 831 F.Supp. 970, 981 (N.D.N.Y. 1993). As clearly stated in Salvadors' pleadings, Auffredou and State engaged in a consistent pattern of conduct targeting Salvadors, as persons who have

utilized their right to access to the Courts to protect their Constitutional rights. *Thornton, supra.* This course of conduct tracks through the Commission's dealings with Salvadors in the permitting process which prior to commencement of litigation by Salvadors against State entities, including the Commission, at which time, the tide turned, and Salvadors faced new, different and additional hurdles in the regulatory process, placed before them by Commission actors. In addressing validity of permitting ordinances and permitting fees for public speaking, parades and assemblies, the Supreme Court in *Forsyth County* v *Nationalist Movement,* 505 U.S.123 (1992), held that the enactment at issue was in violation of the Constitution. The county administrator in *Forsyth, supra,* was given broad discretion with respect to the determination of fees to be charged in specific instances for the issuance of permits and the ordinance further failed to provide necessary standards upon which the administrator was to base his determination. The same is true in the instant case. The creation of the Commission legislatively and effectively left in the unfettered hands of the Commission "legislating" authority through regulation adoption, which, as the Commission states in its papers cannot be displaced or superseded by either DEC or any other named State entity. *Forsythe* clearly delineated the requirements for such a statute to pass Constitutional scrutiny:

> Such a scheme, however, must meet certain constitutional requirements. It may not delegate ***overly broad licensing discretion*** to a government official. See *Freedman* v. *Maryland, supra* [380 U.S. 51 (1965)]. Further, any permit scheme controlling the time, place and manner of speech must not be based on the content of the message and must be narrowly tailored to serve a significant government interest,

and must leave open ample alternatives for communication. See *United States* v. *Grace*, 461 U.S. 171, 177 (1983). *Id.* at 130.

. . . . . .

The reasoning is simple: if the permit scheme "involves appraisal of facts, the exercise of judgment and the formation of an opinion," *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great" to be permitted, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975). [Emphasis added] *Id.* at 131.

The manner in which Appellees, in particular Auffredou and Commission flagrantly flaunts the Commission's self-defined unfettered power allowing it to proceed with either no or conveniently changeable, standards or guidelines remove any claim of legitimacy of action by the Commission and in particular Auffredou with respect to Salvadors. The Commission's and Auffredou's actions violate Salvadors' Fourth, Fifth and Fourteenth Amendment rights and cannot withstand Constitutional scrutiny. Both the actions of Commission and of Auffredou establish the fact that they individually and collectively interpret laws, rules and regulations applied to Salvadors in a different and disparate manner that applied to others similarly situated. The purported "standards" for the application and interpretation of the statute, at best constitute a "movable feast" depending on whose property is at stake. The Supreme Court addressed interpretation:

Based on the county's implementation an construction of the ordinance, it simply cannot be

> said that there are any " narrowly drawn and definite standards, " *Niemotko,* 340 U.S. at 271 [*Niemotko* v. *Maryland*, 340 U.S. 268, (1951)], guiding the hand of the Forsythe County administrator. The decision how much to charge for police protection or administrative time - or even whether to charge at all - is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits vesting of such unbridled discretion in a governmental official. *Id.* 132-133.

The Commission in its "variable" interpretation of their "rules" leaves Salvadors with no set basis upon which they could rely in their dealings with the Commission. With the Commission's creation which, reading applicable legislation in conjunction with the statements of the Commission in this action established a sub-rosa quasi-governmental, quasi-private entity which was effectively empowered to controlled the regulation of not only Lake George, but also any physically connected property and operations to which they can spread their bureaucratic tentacles, evading restrictions, by its status or non-status, to which it would be subjected if it were to claim wholly governmental status. The Commission's claimed "quasi"status, evaded limitations properly applicable to govern-mental entities, and sneaked under the tent for the purpose of cloaking itself with the legitimacy of governmental stature to claim "immunity", prerogative and

privilege. All resulting in the fact that none of the properly applicable regulating factors are placed on the actual operations of the Com-mission. In *Forsythe,* the Supreme Court quoting an earlier relevant decision noted:

> "It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence, that constitutes the danger to freedom of discussion." *Thornhill* v. *Alabama,* 310 U.S. 88, 97 (1940). . . . [C]hallenge on the grounds that an ordinance delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance him from doing so. *Id.,* at Footnote 10.

POINT V

SALVADORS HAVE STANDING TO MAINTAIN THE INSTANT ACTION; AFFREDOU AND STATE APPELLANTS CONVENIENTLY OMIT REFERENCE TO THE *EX POST FACTO* LAW, RULES AND REGULATIONS APPLIED TO THE SALVADORS

Salvadors applied for, obtained and operated under the laws, rules and regulations established by the DEC for operation of their marina promptly upon notification of those requirements. Appellants relied upon the specific written terms and conditions established by laws applicable to their marina operation. Once the "rules" were set and Salvadors complied therewith, Salvadors obtained property rights protected by equal protection and due process for the permit pursuant to which they have continuously operated.

To change the "rules" with respect to such permit and operation "in mid-stream" by enactment of laws, rules and regulations imposing new and additional requirements and limitations upon Salvadors is a clear "taking" of their established property rights in the operation of their marina under and in accordance with the issued DEC Marina Permit.

The opening sentence of Article I, § 10 of the United States Constitution states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; Remit Bills of Credit; make any Thing but gold or silver Coin a tender in payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The Commission's actions "advised" and directed by Auffredou, violated this Constitutional man-date. The creation and use of "moveable" standards when dealing with Salvadors, the Commission fails to comport with the standards enunciated applicable under this provision. In *Andrus* v *Allard,* 444 U.S. 51 (1979), established ownership of property brought with it a "bundle of rights":

> . . . where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. *Id.,* 65-66.

Salvadors may have started their property ownership with a "full bundle" of rights, but with "special" disparate standards applied to them by the Commission, they are not left with the "full bundle"of rights, but with whatever the whim of the Commission and Auffredou determine they may retain. These actions must be found discriminatory and in direct violation of all rational interpretations of Equal Protection. The State and Auffredou claim Salvadors have not pursued all purported available administrative remedies. This interpretation is wrong. In *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522 (1992), the Supreme Court enunciated:

> . . . [W]e must address respondent's assertion that a regulatory claim is unripe because petitioners have not sought rent increases. While respondent is correct that a claim that the ordinance effects a regulatory taking as applied to petitioners' property would be unripe for this reason, see *Williamson County Regional Planning Comm'n.* v. *Hamilton Bank of Johnson City*, 473 U.S. 72,186-197(1985), petitioners mount a facial challenge to the ordinance. They allege in this Court that the ordinance does not "'substantially advance'" a "'legitimate state interest,'" no matter how it is applied. See *Nollan* v. *California Costal Comm'n. Supra*, at 834 [483 U.S. 825 (1987)]; *Agins* v. *Tiburon*, 447 U.S.255, 260 (1980). As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe. See *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. at 495 [*Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470 (1987)] *Agins, supra*, at 260. *Yee, supra*, at

533-534.

In *Agins* v. *Tiburon,* 447 U.S. 255 (1980), the Court, evaluating takings arguments, found:

> . . . [the] determination that governmental action constitutes a taking is, in essence is a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest . . .[which] necessarily requires a weighing of private and public interests. *Id.,* 260-261.

Weighing of public versus private interests is necessary; when a balancing is undertaken Salvadors clearly are entitled to discovery to establish relevant applicable factual material to complete the process. The Supreme Court has held the nature of the governmental action involved is critical to any analysis in a takings case and by logical extension, is a necessary element in any challenge to a stat-ute which in part rests on establishment of unconstitutional takings, as in the instant case. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). The inconsistent application of its "rules" and "regulations" to Salvadors and to their property under Auffredou's advice, direction and counsel, which according to facts presented thus far in this litigation, failed to follow the Commission's own standards and methods.

CONCLUSION

The decision of the Court below should be reversed

and the matter remanded for discovery and for further proceedings as requested herein.

Dated: January 14, 2002

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Madeline Sheila Galvin, one of Appellants' Attorneys, hereby certifies as follows:

The Word Count of the above Brief is **6,858** words based upon the word count function of Word Perfect Version 9, Law Office version. The number of lines contained in the above Brief is **537** lines based upon the same internal computerized count system. Both counts are within the limits allowed by the applicable Rules of this Court.

_____/s/ _____

MADELINE SHEILA GALVIN

State of New York

Supreme Court County of Warren

In the Matter of the Application Of
Dunham's Bay Boat Co., Inc. and
Frank J. Parillo,

Plaintiffs-Petitioners,

- against -

CCN: 56-1-99-0174

Index No.: 38303

The Town of Queensbury Planning Board, The Town of Queensbury, Craig Brown as Code Compliance Officer for the Town of Queenbury, Dunham's Bay Beach and Boat Club, John Salvador, Jr. and Kathleen A. Salvador,

Defendants-Respondents.

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Viscardi, J. The Petitioners-Plaintiffs, Dunham's Bay Boat Co., Inc. and Frank Parillo, seeks an order and judgment pursuant to Civil Practice Law & Rules §3001 and

§7806 declaring that the approval of the Respondents-Defendants' site plan application was arbitrary and capricious, declaring that the Respondent-Defendant Craig Brown, Queensbury Code Compliance Officer is prohibited from issuing a building permit to Respondents-Defendants Dunham's bay Beach and Boat Club and John Salvador, Jr. and Kathleen A. Salvador ("Salvadors") until all required permits and approvals, including but not limited to a variance from the Town of Queensbury Zoning Board of Appeals are obtained, and granting Petitioner-Plaintiffs' costs and disbursements.

The Petitioners-plaintiffs have also cross-moved for an order and judgment pursuant to Civil Practice Law & Rules §3211(g) dismissing the counterclaim by respondents-Defendants John Salvador, Jr. and Kathleen A. Salvador and awarding Petitioners-Plaintiffs' costs, attorneys fees and compensory damages.

The Salvadors sought to construct a ramp to allow emergency and handicap access to the water and beaches on their property which is zoned waterfront residential on which they operate Dunham's Bay Boat and Beach Club, a pre-existing non-conforming use. Due to the fact the proposed project called for hard surfacing within 50 feet of the lakeshore, the project was subject to site plan approval under the Town of Queensbury Zoning Ordinance.

The Salvadors submitted maps and drawings to the Queensbury Community Development Department and on May 26, 1999 filed their application for site plan review, including a short environmental assessment form, with the Town Planning Board. The project was referred to the Warren County Planning Board for review and that board

issued a recommendation that the project be approved. On or about June 22, 1999, the Community Development Department issued its recommendation for approval of the project with the condition that use and construction be in compliance with the Lake George Park Commission and other regulatory agencies. The Planning Board reviewed the application at its meeting and public hearing on June 22, 1999. The Salvadors at that meeting explained they intended to improve the present facility for the sole purpose of providing up to standard handicapped and emergency access facility which would continue to be limited to only dues paying members of the Beach Club and registered guests of the Dunham's Bay Lodge. Access would also be allowed for emergency vehicles and would allow fire fighters to draw water for fire fighting use.

The Planning Board conducted a State Environmental Quality Review Act (SEQRA") review which resulted in a negative declaration. The Planning Board approved the project with the condition that the use and construction be in compliance with the Lake George Park Commission and other regulatory agencies.

The Petitioners contend that the project is one for the construction and operation of an improved commercial boat launch. Petitioners contend that the proposed project is not a permitted use in a waterfront residential zone; that the project required a variance since it was an expansion of a non-conforming use; and that the Planning Board failed to take a hard look at the areas of relevant and environmental impacts upon the Shoreline of Lake George including placement of a paved road up to the concrete structures into the waters of Lake George, traffic on existing roadway, New York State Rt. 9L, diminution of the aesthetics of the area,

water quality due to run off, and whether the proposed use would comply with the zoning law. The Salvadors in response contend that their property has been used for years by ambulance, police and others involved in rescue or emergency situations at the south end of Lake George; that these emergency vehicles have experienced difficulty in maneuvering in this area due to its sandy condition; that they have had both employees and guests with physical handicaps at their property; that the handicapped persons attempting to enter and exit from vessels at their facility currently require assistance; and that the sandy nature of the soil hampers mobility of such handicapped persons. It is further contended that the handicapped usage would be limited to registered guests and members of the Bolton Beach Club and not a facility open to the public at large and that any expansion of their facility is that only those persons with physical and/or mental handicaps who were previously more limited in their ability to enjoy Lake George would be more able to enjoy the lake.

The Town contends that the petitioners have overstated the scope of the approval granted to the applicants by the Planning Board; that the approval granted by the Board was not to construct, install or operate a commercial boat launch, but only a modification of existing facilities to allow better handicap and emergency access by constructing a hard surface area using permeable wood decking. The town further contends that the applicants have not requested and the Planning Board has not granted any approval for any increased or new use of the subject premises and thus the site plan approval is specifically conditioned upon the applicants' compliance with Lake George Park Commission regulations or other regulatory agencies.

In an Article 78 proceeding the reviewing court will

not substitute its judgment for that of the Board or set the Board's determination aside unless it clearly appears to be arbitrary or contrary to the law (see, Matter of Brucia v. Planning Board of the Town of Huntington, 157 A.D.2d 657).

This court does not find the grant of approval will result in any increase in use or change of use than is what already permitted. The only difference is that the present uses may be more easily undertaken by dues paying members of the beach club and the guests of Dunham's Bay Lodge, handicapped and the non-handicapped. The Plaintiffs-Petitioners' claims of adverse environmental impact are conclusory and not supported by the record. The project as proposed consists of wooden bridge decking materials so that rain water will be diverted to or peculate into the ground below and thus should not increase runoff into the waters of Lake George. There is no greater permitted use being allowed and thus any environmental impact should be no-existent. Thus the Planning Boards issuance of a negative declaration following a review of the issues fulfilled its obligation under SEQRA.

The cross-motion to the extent it seeks to dismiss the counterclaim by the Salvadors is granted on the basis that it does not state a cause of action. With respect to Plaintiffs-Petitioners' claim for attorney's fees and costs, even if this counterclaim was a SLAPP (Strategic Law Suit Against Public Participation) suit, the decision to award attorney's fees and costs is discretionary rather than mandatary (see, Matter of West Branch Conservation Association, Inc. v. Planning Board of the Town of Clarkson, 222 A.D.2d 513, 115). The court declines to award attorney's fees and costs.

For the foregoing reasons it is the decision of this

court that the petition be dismissed and that Defendants-Respondents are entitled to a judgment declaring the approval of the Defendants-Respondents' site plan application was not arbitrary, capricious, or contrary to law. The counterclaim asserted by the Salvadors is also dismissed

Defendant-Respondent Town to submit order and judgment on notice without costs.

Dated: Ticonderoga, New York

October 22nd, 1999

/s/
J.S.C.